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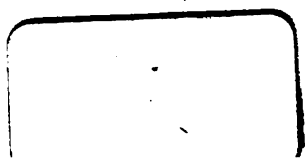
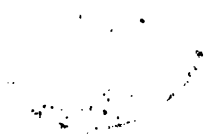
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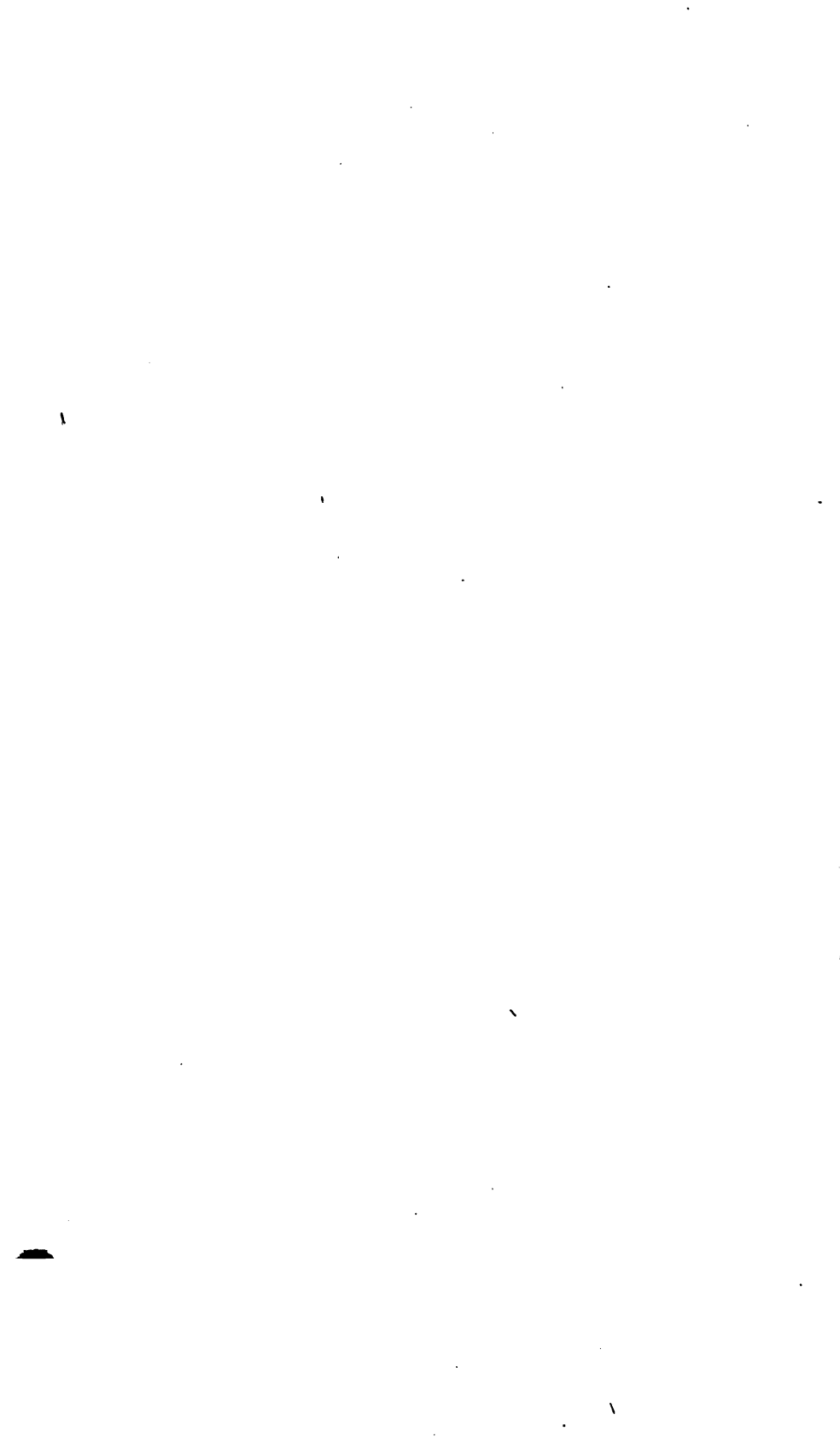
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*Richard B. Hood*  
*June 9<sup>th</sup> 1828.*

**AN ESSAY**

6.745

**IN A COURSE OF LECTURES**

**ON**

**ABSTRACTS OF TITLE;**

**TO FACILITATE THE STUDY,**

**AND THE APPLICATION**

**OF THE FIRST PRINCIPLES,**

**AND**

**GENERAL RULES**

**OF THE**

**LAWS OF PROPERTY;**

**STATING IN DETAIL,**

**THE DUTY OF SOLICITORS IN PREPARING, &c. AND OF COUNSEL IN  
ADVISING, ON ABSTRACTS OF TITLE.**

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**By RICHARD PRESTON, Esq.**

**BARRISTER AT LAW.**

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**VOL. I.**

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**O. HALSTED, NEW-YORK,  
WM. ABDALLAH HALSTED, PHILADELPHIA.  
LAW BOOKSELLERS.**

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**1828.**



TO  
THE RIGHT HONOURABLE  
**JOHN LORD ELDON,**  
BARON ELDON, OF ELDON  
IN THE  
COUNTY OF DURHAM;  
LORD HIGH CHANCELLOR  
OF THE  
UNITED KINGDOM,

THIS Work, designed to assist the rising generation in the study of the Principles and general Rules of the Law of Titles to real Property, and the Practice of the Chamber Counsel, is PRESENTED; as a sincere though humble tribute of esteem for the profound knowledge of Principle and Practice for which his Lordship is so pre-eminently distinguished; and for the zeal with which he has uniformly inculcated the importance and the necessity, even to the Counsel practising at the Bar of his Lordship's Court, of an intimate acquaintance with these rules and principles, as the best and most genuine foundation of Legal Knowledge; by

RICHARD PRESTON.



## TO THE READER.

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THE work now offered to the Profession originated, and was, in a great measure, completed, in a Course of *Lectures* to Pupils.

The Lectures were delivered without any previous arrangement of the subject, or collection of authorities, and without the most distant intention of publication.

These observations are offered as an apology for the want of a more complete and systematic arrangement of the subject.

That a large number of copies are in existence, all of them containing inaccuracies committed in dictating the lectures, and many of them containing the errors and omissions of transcribers, are among the motives for offering the work to the Public with priority over the *Essay on Estates, &c.*

The object in view dictated the order of the parts, and each head was discussed briefly, or in a more extended manner, as *the duty* of communicating useful information to the pupils seemed to require. The different parts of the work will, on this account, be found very unequal in extent of information.

To have discussed every head fully would have extended the work to an inconvenient size. Instead of an Elementary Book, a diffuse Treatise would have been produced. The object was to give an outline, not to fill it up ; and to enlarge on those heads only which are most useful in practice, and on which least information, in a connected series of observations, is to be found in other works.

Pupils in succession have uniformly declared, and by their improvement have evinced, that this work has aided their studies more than any other book which has been put into their hands.

It taught them that practical knowledge, and gave them that facility of analysis, and those results of experience, embodied in writing, which, unfortunately for the Profession, are generally allowed to die with the possessor ; or which, if verbally delivered, without being committed to writing, are retained imperfectly, and

do not admit of examination, when their accuracy is to be brought to the test of practice.

To instruct the solicitor in the mode of preparing his abstracts, and assist him in selecting its materials, is not the only object of this work. It aims at the higher and more important end of inculcating First Principles; of giving the *rules*, and teaching the *reasons* on which the practice is founded. The reader is elicited, by easy transitions, from the most simple propositions into the more abstruse rules of Law. That labour which would deter any student who must collect the materials for himself, from the pursuit of recondite and difficult points, is, it is hoped, rendered, by inductions, and gradual preparation, so simple and so easy, that the present work may be well used, as it is intended to be, as a *manual* or *grammar* of the Rules of Law respecting Titles.

Among his own Pupils, at least, this work has answered the design of the Author far beyond his expectation; and he has had ample experience of its utility.

When it is considered that an Abstract is one of the first acts on which a young man is required to employ his talents, or exercise his industry, and that no one can prepare a draft from the deeds or other documents of a title, without first abstracting, or selecting and combining, the several parts, arranging them on paper, or in his mind, it will be obvious, that any guide to assist him in this undertaking must, if it teach him the best, or even in the absence of better assistance, a good mode of performing his task, be of great utility.

To carry the Student into a knowledge of the grounds and rudiments of Law, by teaching him, step by step, the Principles and the Reasons of the Practice; and to lead him, while learning to prepare his abstract, into the more nice and difficult branches of the Profession, was deemed an object justifying the labour of the undertaking, and the still more arduous work of publication.

It is fully intended, and finally arranged, that this work should be completed in three volumes.

It consists of one hundred Lectures, delivered in as many hours; each Lecture having occupied one hour. The reader may therefore, by the devotion of one hour in each of one hundred successive days, attain with ease the knowledge to be acquired from the perusal of this work. But though the work was dictated in one hundred hours, its revision, its correction, and



the reference to authorities, have occupied a much larger portion of time.

Great anxiety has been felt to render the work as accurate as circumstances would admit. But in a work of this nature, depending so materially on conclusions formed in practice, and often on an attempt to collect and reconcile the jarring and discordant opinions of Practitioners, and the fluctuating opinions of successive Judges, it would be the height of presumption and absurdity to expect to be free from error, or to escape from just criticism.

Were positive exemption from error required from authors, how few works would be proper for the eye of the Public ! The work is as correct as the Author could make it, consistently with his other pursuits ; and he has availed himself of every opportunity of detecting and correcting the errors into which he had fallen.

Many of the propositions depend on practice and opinion, and are not to be relied on with confidence, but to be received with caution. When authorities are given, they are intended rather as the medium for further research, than as the foundation of the proposition to which they are attached.

In directing the studies of the reader, the author has given a reference to works of merit with every attention to justice and professional utility. He has referred to his own productions oftener than has been pleasant to his feelings ; and he has referred to them only because they most fully express the doctrines which he wished to inculcate ; and because the present work often fills up the chasm left in the preceding works ; or because he wished to avoid repetition, and to render the several publications parts of one and the same system.

The reader will observe that the Author has bestowed most labour on those parts which are connected with his first Essay. Thus titles, under Tenants in Tail, and for Life, are meant to be supplements to the Essay on the Quantity of Estates, rendering that work more extensively useful in practice.

On the other hand, as the productions of the Author's earliest studies were principally employed in collecting or in framing the rules of construction, and collecting the authorities under which estates in fee and in tail, and for life and for years, are created, the observations on these topics, will, in the present work, be very concise. Utility has been the Author's object. His prin-

cial motive for the publication is to assist the studies of others ; to supply to those who from their circumstances in life cannot become pupils in a regular course of reading, some of those advantages which are to be derived from a scientific course of study, under the direction of those who devote a portion of their time to this rational and useful mode of assisting young men to become qualified to practice with honour and credit to themselves, and security and advantage to the Public.

To the Writer of these observations it is a pleasing reflection, that his Pupils have been a source of great comfort, satisfaction, and improvement to himself. In instructing them he has greatly extended the sphere of his own knowledge. The ardour and animation excited in communicating instruction to them have produced most of those works which the Profession have had, or are likely to have, from the Author.

Without the duty of communicating information to others, he would never have embodied into writing either the present Essay, or the three volumes already published of the *Treatise on the Practice of Conveyancing*. Such as these works are they are given to the Profession, as the means of assisting the studies of others, rather than as perfect works ; as the foundation for future and more extensive research, than as complete treatises.

To candid and liberal communications, suggesting errors, or questioning the accuracy of any of the propositions, the author will pay every deference and attention. He will be more ready to correct any errors, (and he is prepared to expect that there are many,) than to persist in them.

In the third volume, an index to the cases, and to the principal points, will be added.

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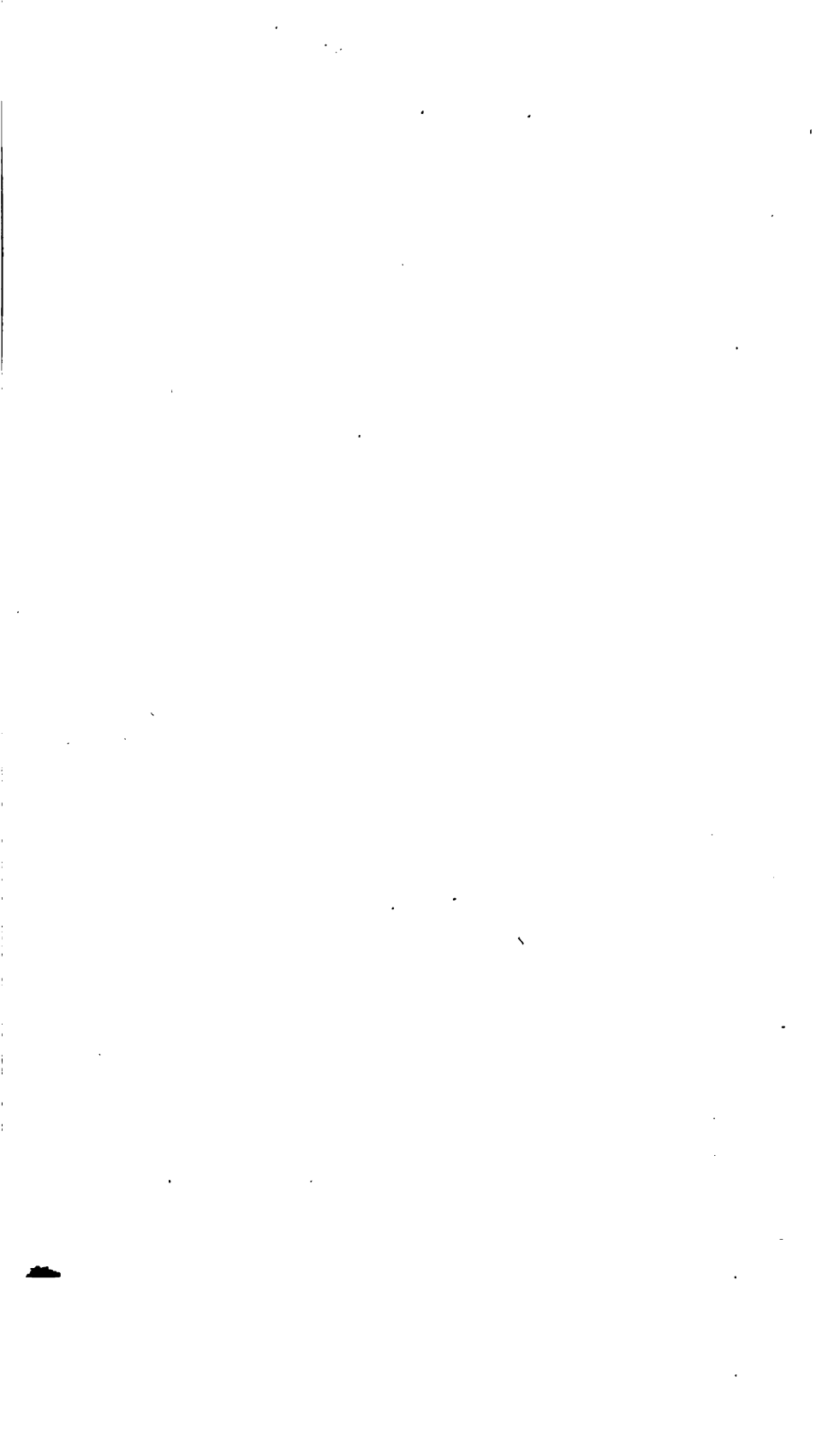
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ON

# THE LAWS OF PROPERTY

AS APPLICABLE TO

## ABSTRACTS OF TITLE.

---

### ON TITLES.

WHEN land, or other property, which does not pass by mere delivery, but is held by a title, depending on documental evidence, is sold, it is the duty of the *solicitor* for the vendor to prepare an abstract of the title; and of the solicitor for the purchaser to compare the abstract with the deeds, wills, &c., and to call for evidence of the facts which are stated as relevant to the title; and to take care that the abstract contains a correct and faithful statement of all circumstances disclosed by the deeds, wills, &c., or depending on extraneous facts, as *marriages, burials, baptisms, possession, descents, disseisins*, and the like, and which are material to the title.

The general practice is to produce the deeds, &c. to the purchaser's solicitor, at the office of \*the vendor's solicitor. [\*2] But wherever the documents of title are, the purchaser must procure some person on his behalf, to compare the abstract with the evidence of title.

When the abstract is thus prepared, and if necessary, corrected, it is generally submitted to the conveyancer or counsel. Few solicitors take on themselves the heavy responsibility of advising on a title, if implicated with any nicety, or giving occasion to any question of difficulty.

Indeed it is a subject of surprise that more titles, accepted under the advice of solicitors, do not prove defective, when the most experienced and skilful conveyancers, and learned practitioners, feel so much difficulty in discharging their arduous duties.

No one can comprehend the labour which a conveyancer must undergo, unless he has had actual experience or observation of the difficulties to which he is exposed, of collecting and combining facts, expounding intention, and applying abstruse rules of law.

The conveyancer, of all the other lawyers, is in a situation to be most severely oppressed by labour and by difficulty: and ought to

be as learned, perhaps considering his duties, more learned in the law, than the members who are engaged in any of the other departments of the profession.

It is his province to consider the title, to advise on the abstract [\*3] tract ; to point out the defects, \*if any, which exist in the evidence of the title, and the doubts which arise on the construction or the sufficiency of any of the deeds or wills, or the doubts in which the law, as it applies to the facts, or the language of the instruments of title, is involved ; also the means by which these defects may be supplied, or those doubts may be removed ; also on the mode of conveyance proper to be adopted in order to complete a title in the purchaser.

The observations to be made respecting the *form* of abstracts, and even the commencement of the evidence of title, may with propriety be extended to transactions between *mortgagor* and *mortgagee* ; though the conveyancer will be governed in his conclusions by some rules applicable to vendors and purchasers which do not apply with equal force to *mortgagors* and *mortgagees*.

In treating of abstracts of title it will be proper to consider,

1st, The circumstances necessary to be regarded in preparing the abstract, and the cautions to be observed in comparing the abstract with the title deeds, &c.

2dly, The points to which attention is, in a more especial manner, to be paid, in considering and advising on the state of the title.

Under the first head are to be discussed,

1st, *The commencement of the evidence of the title, in other words, the time from which the abstract of title should take its commencement.*

\*2dly, *The form in which the abstract should appear ; and*

[\*4] 3dly, The circumstances which should be stated in explanation of the abstract.

In general a *head or title is given to the abstract*. It should be so far full and explicit as to show whose title is to be considered ; and what is the general description or class of property to which the attention of the person who is to peruse the abstract, is to be directed,

Few things are more distressing than to wade through a long abstract ; to combine its parts, select the distinctions which different parts require ; and in the sequel to discover that nine tenth parts of the labour which has been employed has been useless, and has distracted the mind to no purpose.

On long abstracts it would be useful to give a list of the dates of the deeds in chronological order, and to show by proper references the pages in which the material deeds, wills, &c. are to be found.

An arrangement of dates artfully made, may lead to great difficulties, and sometimes to very erroneous conclusions.

If a summary or abridgment of the title were also added, so as to give a general review of the substance of the title, the facility of perusing the abstract would be increased. Such summary, however, should never be attempted, except by a person who can rely

on his skill to give the contents with accuracy. A wrong \*impression once communicated, is not easily effaced; and [\*5] may mislead, especially those, who are liable to various interruptions during the perusal of a long abstract.

All these topics will be more fully discussed under the proper heads.

*1st, Of the time from which the abstract of title should take its commencement.*

The general practice is to take the commencement of the title, so as to show the state of the evidence for a period of *sixty years* at least; and as often as circumstances will permit this should be done.

In many cases it is material to carry back the title even to a more remote period.

This is particularly important when the *first* deed in the abstract is a recovery deed, or some other deed founded on a prior instrument, as an appointment, &c. in execution of a power; and also in the case of advowsons; and of heirs deriving their descents from a remote ancestor, as the first purchaser; also in titles derived under grants from the crown, &c. &c. but even in the instance of grants from the crown, a vendor is not under an obligation to show the intermediate deeds, &c. between the grant, and that period at which, by the ordinary rules of practice, the evidence of his title would commence.

So when a *settlement* is made in *pursuance of articles*, great anxiety is properly displayed, to \*obtain an inspection of the [\*6] articles themselves, that the purchaser may be satisfied that the settlement is a due performance of the articles; and this anxiety increases in proportion as there is reason to suspect that a larger interest has been obtained under the settlement, by the parents, or one of them, than the articles warranted; or when the settlement manifestly betrays the absence of professional skill in preparing the limitations of the settlement. Also when an *appointment* is made in exercise of a *power*, there is a like desire to have an abstract of the deed which created the power: more especially if there be not any recital, or there is a very short and, apparently, defective recital of the power. And when the seller's solicitor does not state in the abstract, the deed containing the *power* under which the appointment was made, or the deed or will by which the intail was created, the purchaser's solicitor or counsel should, by every means, endeavour to trace the commencement of the title to its source, by ascertaining the creation of the estate tail, or the power; and as often as there is ground to suspect concealment, or suppression of material deeds, &c. a bill should be filed in equity for a discovery of the deeds; or, if a suit be depending, the production of the deeds may be enforced under the usual order, that the vendor shall produce all deeds on oath, &c.

Interrogatories may also be exhibited in the master's office, for

[\*7] the discovery of deeds, &c. \*on showing a ground, which raises a suspicion of suppression or concealment.

By established practice, it is no longer an objection to a title under a *recovery deed* made upwards of sixty years since, that the creation of the estate tail cannot, in point of fact, be shown.

And although it be the safe and correct practice, that a person who is tenant in tail with reversion or remainder in fee by descent, should suffer a common recovery, that the title may be independent of the reversion or remainder in fee, and consequently of the charges affecting that estate, yet without showing some existing encumbrance, it is not an available objection, that the title depends on a fine with proclamations, by which the estate tail has been barred, and the ownership under the estate tail merged in the remainder or reversion, so that the charges and encumbrances, if any, affecting the reversion or remainder would be accelerated.

In general appointments contain a full recital of the power under which they are made ; and recovery deeds contain a history of the creation of the estate tail ; and this recital is, in reference to ancient deeds, generally, and by experienced men, treated as satisfactory on the point of the existence of the power, and of the creation of the intail, and of the mode in which the power was to be executed, and the circumstances and ceremonies which were to attend the execution.

[\*8] \*But *inaccuracies* in a deed or will, betraying the want of professional knowledge in the person preparing the instrument, lead to an inquiry for an inspection of the deed containing the power, &c. &c.

The habit which prevails among conveyancers of inquiring for the deed or will, by which the estate tail is created, renders it prudent in most cases, in preparing recovery deeds, to show the creation of the estate tail, and the existence of the right to suffer a recovery.

There are cases, however, in which it would, in preparing such a deed, &c. be injudicious to disclose the creation of the estate tail.

This observation applies, when it is doubtful, whether the party is tenant for life, or in tail ; or when the disclosure of the intail would lead to other information, which it is better to keep out of view.

The creation of the power under which an appointment is made should also be shown in every deed, or will, operating as an appointment ; and the circumstances required to the valid exercise of the power should be stated, as far as they are material to the operation of the deed, or will, made in exercise of the power.

When the power is in perplexed language, the power should be recited *totidem verbis*.

But in cases in which it is doubtful whether the power [\*9] would be a good root or foundation \*for a title, it is, in preparing deeds, expedient to pass over the power without any recital thereof, or reference to, any power in particular.

Also, when the title depends on a *settlement* made in favour of a

*wife as tenant in tail*, the state of the prior title should be shown, that it may appear, as often as it can be material to the subsequent deduction of the title, whether the wife is the settlor, or she took an estate tail, *ex provisione viri*.

This however is material only when the title would otherwise, *apparently*, depend on some act done by the wife alone, *while sole*, or with a second husband, for the purpose of barring the intail; and which would be ineffectual, in consequence of the statute of Henry VII. if she had been tenant of an estate tail, *ex provisione viri*.

*Prima facie* lands settled by the husband and wife by fine, are considered as the inheritance of the wife.

This presumption however cannot be relied on by the conveyancer, when the fact can be ascertained.

Also, as often as an abstract commences with a settlement, made in pursuance of *articles*, or under a *trust*, the articles, especially if entered into, and executed previous to the marriage; or the *deed creating the trust*; should be abstracted as far as they are material; and if they are omitted by the vendor's solicitor out of the abstract, this omission should be supplied, as far as it shall be \*feasible, at the instance of the solicitor for the purchaser. [\*10]

And if the articles or deed creating the trust cannot be found, the *recitals* of the articles, and of the trusts on which the settlement is founded, should be stated fully, as far as they are introduced into the settlement, and are material to the title.

After acquiescence in the settlement for a long series of years, *recitals* are frequently deemed sufficient evidence of the contents of the articles.

But if, as sometimes happens, the settlement is made in *pursuance* of the articles or trusts, and merely with reference to them, without stating the particulars of the articles, or the trusts, on which the settlement is founded, the conveyancer will be driven to the necessity of considering whether the settlement is such as the nature of the case seems to have required. And in settlements made in pursuance of marriage articles, as often as the words, "Heirs of the body" are used in the settlement, as words of limitation to give an estate tail to both or one of the parents, especially the husband, this difficulty presents itself with great force, since it is likely that this expression was used in the articles or trusts, as words of purchase descriptive of the children of the marriage.

On settlements made in pursuance of articles a very useful note, for which the author is indebted to the friendship of Mr. Watkins, when living, will be added in its proper place.

\* Also, as often as a title is for a *term of years*, the creation [\*11] of the term should be shown from the original deed or will, if it be in existence; or if the deed creating the term be lost, the creation of the term should be stated from the recitals, as found in the more ancient deeds; and there should be a rigid adherence to the language of such recital.

A title has oftentimes been treated as defective, because the deed creating the term could not be found ; but it has always appeared to the writer of these observations, that a title depending on a term for years created at a distinct period, may be good, notwithstanding the loss of the deed creating the term.

The following observations present themselves on this point :

Though it be true, that the deed creating a term is material to the title, and is the evidence on which a purchaser can best rely, yet a title under a very long term of years, which has been created for sixty years at least, appears to be marketable without evidence of the creation of the term, since against all persons, except the lessor, or those who claim the reversion or remainder under him, *the recitals* are evidence of the state of the title ; and the lessor, or those who claim under him, cannot by any means, after sixty years, recover the lands without proof of an actual seisin within that period. To show the seisin, they must adduce evidence [\*12] of the \*tenancy ; and, in adducing such evidence, unless in very particular circumstances, (as where a rent is reserved,) they must support the title under the term ; and in several instances, titles have been approved by gentlemen of distinguished eminence, although there was not any evidence of the creation of the term except by recital. Mr. Booth treated the want of an original lease creating a term even of a modern date, as a ground only for caution, and not as an absolute defect of title. And though the recital be not evidence as a recital, yet the recital with possession under it, and agreeable to the same, would be admitted as evidence, for the same reason that, for want of other evidence, an *ancient abstract*, a copy, &c. would be admitted.

An abstract of title to leasehold property should commence with the original lease, and all subsequent assignments should, in general, be abstracted.

It should contain the like evidence of deaths, payment of charges, &c. as an abstract of the title to a freehold estate.

Where the estate is a leasehold for years, and has been recently and specifically bequeathed, and the legatee is the vendor, without the concurrence of the executors, proof must be given of the assent of the executors to the bequest.

Where the estate passes by a will, or letters of administration, it must be shown that the will was proved in, or that the administration was granted by, the prerogative or other court, [\*13] \*having jurisdiction over the place in which the lands are situate.

In preparing abstracts of title to *leasehold property under building leases*, or beneficial leases for short terms of years, the evidence of the title generally commences with the indenture of lease by which the term was created.

But as to titles depending on *building leases*, the practice has for



a long time been to require the production of evidence of the title of the person by whom the lease was granted.

And if the *lease* was made *under a power* or a *trust*, it was always the practice to require that the *power* or the *trust* should be abstracted, as the means of showing that the lease was warranted by the power or the trust.

It was formerly a point on which there existed a difference of opinion, whether the purchaser of the benefit of a lease could require an abstract of the title of the lessor.

In modern practice the right is generally precluded by one of the articles of sale.

The question of right can arise only in the absence of stipulation.

It has recently been decided, that a person who *contracts for a lease*, to be made by a person who holds under a *leaseholder*, has a right to an abstract, disclosing the title of the freeholder by whom the original lease was granted.

This is in principle a decision, that the person who contracts for a leasehold interest is, in the absence of stipulation, entitled to know the state \*of the freehold title out of which [\*14] the lease is derived.

So where there was a contract for the sale of an existing and a reversionary lease, specific performance was withheld for want of the production of the title of the lessors.—*Deverall v. Lord Bolton*, 18 Vesey 605.

Lessors are become very cautious how they produce the evidence of their title; and unless they have covenanted to produce the deeds, there does not appear to be any means to compel them, otherwise than as between litigating parties in a court of law by means of a subpoena *duces tecum*, &c.

In the case of leases by *Hospitals, Bishops, Ecclesiastical Persons*, and *Ecclesiastical Corporations*, &c. who have an unalienable estate as to the inheritance, and who have a particular power of leasing under Acts of Parliament; and also as to *corporations* (such as the *city of London*) who have notoriously been the owners for a long series of years; the invariable practice is not to require any evidence of title beyond that of the lessee.

But leases from these ecclesiastical bodies and other corporations, and even individuals, are frequently obtained under a *tenant right*; namely, a favour to the former tenant, as a continuance or an enlargement of his interest.

As to leases under enabling statutes, care should be taken to see that the former leases have been duly surrendered by the persons who, \*in point of estate, were competent to make [\*15] the surrender, and that the lease does, in all its circumstances, pursue the power under which it was made.

To ascertain that the former leases were duly surrendered, the legal title is to be traced without any regard to the equitable ownership. Many titles are defective in this particular. Indeed few

will bear strict investigation. When they are good, it is more from chance or the lapse of time, than from caution. Suppose there are three leases in succession for forty years on different renewals made by different deans, &c. The second lease might be granted without a surrender, actual or virtual, before the first lease was expired, and before the commencement of the last year of that lease. Thus this lease would not be good under the statute of Henry VIII. since it was not either surrendered or expired within one year: and the third lease might be granted after the expiration of the first lease, but during the second lease. The third lease, without a surrender of the second lease, would be good only on the ground that the second lease was or had become void.

On this point some observations will be found in that part of these notes which shows the duty of the conveyancer.

Leases of this description are frequently the subject of settlements, and the renewals are obtained under that preference to the former tenants, which in courts of equity is denominated [\*16] *\*the tenant right*; and as often as the lease is obtained under a tenant right, the state of the title should be shown during the last sixty years, so that it may appear that the title is good in equity, as well as at law, and not affected by any trust founded on the tenant right.

At least the purchaser must trace the title through each successive owner, as far as he has notice of any trust.

Any reference to former settlements by means of a surrender, or through the existing lease, will lead to an inquiry, and be constructive notice of all encumbrances falling within the scope of the inquiry suggested by this notice.

It would greatly relieve titles of this description that the new lease should be made altogether independently of, and without any reference to, the titles under the former leases.

Of course the surrender of the former leases should not form a part of the express consideration of the new lease.

As often as it may be practicable, the abstract of title to freehold lands should commence with the deeds of conveyance to a person who was the first purchaser.

Such conveyance would afford a strong presumption that the title was considered good at that time; and that the person by whom the conveyance was made was the absolute owner in fee simple. And possession for the last sixty years under that conveyance, renders the presumption in favour of the title so [\*17] strong, that *\*no one ever thinks it necessary to inquire for further evidence, except under particular circumstances, as rumour of a threatened claim, or actual knowledge from other deeds that there is a latent defect of the title.*

And it frequently occurs to conveyancers in extensive practice, to know that the title, as represented by the abstract, does not disclose all the material information which ought to be stated: and though they will not, unless a fraud be practising, give any intima-

tion of their knowledge, they will be firm in pressing for further evidence.

When the title cannot be taken up with a purchase deed, the next best instrument on which to found its commencement, is a will, or some settlement, made by a person acting as the absolute owner of the fee simple. This document, with possession, consistent with the evidence of the title, furnishes the like presumption of a good title. And the presumption is greatly strengthened, if there has been a frequent change of ownership, without any adverse claim.

When a vendor has very ancient deeds, there is frequently a difficulty on the part of his solicitor in deciding whether all the deeds should be abstracted.

To abstract all the deeds is, in many cases, to invite tedious inquiries and long discussions, which would answer no useful purpose to the purchaser. A discretion ought to be exercised on this point.

\*No substantial defect in the title ought to be concealed [\*18] by withholding the knowledge of the deeds, which may give a different complexion to the title.

On the other hand, it cannot be expected that on mere matters of form, a vendor should furnish the means of enabling a reluctant or over-cautious purchaser, or those professional men who are more nice than wise, to treat the title as difficult or doubtful; when no one, acting with a sound discretion, would view it as attended with either difficulty or doubt.

It must not however be forgotten, that many titles which are by the abstract, made to appear as if they were good and free from all questions, are, in point of law, defective, if the facts which the title involves were fully disclosed; since there may be dormant titles under old intails, remainders, &c. On the other hand, by a suppression of material deeds, the heir of a family has frequently been able to show a title in himself as the rightful or absolute owner, while he had only a limited interest as a base fee, or he was not the heir to the first purchaser.

Suppose, for instance, a man seised *ex parte maternâ*, to have made a settlement at the distance of sixty years, and to have limited the ultimate use to his right heirs; the limitation in favour of his right heirs would be his *old use*; and the fee would have been descendible to his heirs on the part of the maternal ancestor, the first purchaser.

\*Collecting the title from the settlement, without knowledge of the descent, the settler would be treated as seised in fee as the first purchaser, and consequently a title derived under the *paternal heir* could not be questioned without knowing the state of the title in the settler; while the title really would be in the maternal heir.

So if a will or other instrument, dated at the distance of about sixty years, and constituting the root of the title, give all the mes-

suages, &c. *purchased* of a particular person ; it is usual, if practicable, to show the purchase deeds, to make out the application of the language of the deed or will to the parcels.

However, *enjoyment* for sixty years under the gift in the deed or will, would be presumptive evidence, sufficient to render the title marketable, since possession would prove *primâ facie*, that the lands thus held were derived under this purchase.

Other like cases may call for a like extension of the evidence of the title ; more especially when the deeds, &c. are applicable to a *reversionary* interest, and the same has never fallen into possession, or has fallen into possession within a recent period.

And the knowledge and fullest experience that suppressions take place, and that titles are manufactured, to make them subservient to the interests of the parties, conveyancers frequently incur the [\*20] imputation of making inquiries which \*are deemed irrelevant, while these inquiries are suggested by the experience they have derived from practice.

Sometimes the first deed in the abstract is of a date falling within the period of sixty years : but the history of the title is traced through a period of that duration, by showing, either from the *recitals*, or from a detail of the title in the description of the parcels, or from the assessments to the land tax, &c., that the ownership on which the title depends, commenced upwards of sixty years since ; and this, in general, is deemed satisfactory ; especially after an inquiry for wills, settlements, &c. as far as that inquiry can reasonably be prosecuted.

Different circumstances however impose the necessity of different degrees of caution.

That a large estate has been subdivided among many purchasers, at the distance of thirty or forty years, removes the suspicion of concealment ; and accounts, in the most satisfactory manner, for the absence of the more early deeds.

The general rule ~~is~~ to take up the commencement of the title from a period of sixty years, or from the last purchase deed, or the last settlement prior to that period.

But the purchaser has a right, if he think fit, to require that the abstract should state all the deeds, wills, &c. in the possession or power of the seller ; and, as may be collected from a former [\*21] observation, there are many instances \*in which a title appearing regular during the period of sixty years, would assume a very different complexion, and furnish a very different conclusion if it were investigated for a further period.

The case which gave rise to *Goodright v. Forrester*,\* particularly illustrates this proposition : and it is observable, that though *sixty years possession*, under a seisin in fee, is a bar to the remedy by a *writ of right*, a title may, in point of law, remain defective after a period however indefinite. For instance, if successive estates

\* 1 Taunton, p. 585.

tail be created, with remainder in fee, the title may, under fines and nonclaim, or the statutes of limitation, be good as against one or more of the tenants in tail, and be defective as to the more remote estates. ✓

For each tenant in tail and his issue, and also the owner of the remainder or reversion in fee, will be allowed a period of twenty years from the determination of the prior estate for the purpose of asserting his title; and if the right *first* commence in an infant, married woman, person beyond the sea, non compos, or in prison, each person labouring under such disabilities, and being the person to whom the right first accrues, will have a further period of ten years to make his claim. See the statute 21 James I. cap. 16, § 2.

These observations, as they refer to *time*, apply to a case in which no fine with proclamations, \*capable of operation [\*22] under the statutes of non claim, has been levied; for when a fine with proclamations has been levied, the claim must be made within five years from the time when the right accrues, or the time at which the disabilities cease.

Hence, in a case involving the common mistake of levying a fine, when a common recovery was the proper and only available assurance, the title becomes involved in great difficulty, and at least requires many, and in some instances, very expensive inquiries and investigation, to prove a title to the entire fee simple: and in many instances no title can be obtained to more than a base or determinable fee; or, at least, the title to any greater interest cannot be relied on as clearly acquired: or if there be a fee simple in the vendor, his title to that estate commenced under a *discontinuance*, or a *disseisin*, and has left, in other persons, rights or titles of entry or of action not yet effectually or indisputably barred.

Also when a title is derived *by descent* through successive ancestors it is sometimes (as may be collected from a former observation) necessary to go back for a period exceeding sixty years for the purpose of ascertaining the first purchaser; since the descent may be materially varied, in this respect, by the actual, when compared with the presumable, state of the title. Indeed, a vendor, deriving his title under or through a *maternal ancestor*, cannot \*make [\*23] out the evidence of that title, without showing seisin in the maternal ancestor.

The like observations apply to instances in which there are not any title deeds whatever.

In a case of this sort the title depended on successive descents. An objection was taken to the title on the ground that there were mere descents and no deeds.

It was the better opinion, that the want of deeds did not afford any objection to the title; but the conveyancers who were consulted would not be satisfied with the title as strictly marketable. They advised that the seller ought to make an abatement of one-third part of the purchase money, on account of the risk to which the title was exposed; and the difficulty which would attend the

same when carried to market : and such abatement was made accordingly.

In a subsequent case, a gentleman who was the purchaser, resisted specific performance, on the ground that the title rested merely on possession, without any deeds carrying on the evidence of title. A suit was instituted in Chancery. The report and the decision were in favour of the title, and specific performance was decreed against the purchaser.

Were the rule different, a title depending on successive descents through many generations, would be the worst of titles to carry to market, while in intendment of law it is deemed the safest of titles.

[\*24] \*When the land lies in a *register county* the title is relieved from difficulties of this nature : and this is one of the many advantages to a vendor attending the registry of deeds in counties which have a register : for as no will, settlement, &c. would have appeared on the register, the purchaser's suspicions would not have arisen, nor could his objections have been sustained ; since a deed or will not registered is not binding *at law* against a *purchaser with or without notice* : and even in equity is not of any avail against a purchaser for a *valuable consideration*, without notice. To the purchaser there is the further advantage from a register, that he obtains a clue to all deeds, wills, &c. affecting the property.

Great however as are the advantages of a register in some cases, yet the advantages are more than counterbalanced by the inconveniences to which they give rise ; from the difficulty of investigating titles, or of answering the doubts which a register often suggests ; thus leading to useless and inconvenient researches.

In the instance of the purchase *without any title deeds*, various precautions were taken to guard against the possibility of latent intails and other encumbrances. A common recovery was suffered by the vendor, with a view to bar his estate tail, if any, and all remainders expectant on the same. A *feoffment* was made by him and

his brothers and sisters, and a fine levied with proclamations [\*25] by them and the \*vendor for the purpose of establishing the title through the medium of the statutes of nonclaim on fines, and to bar dormant intails not within the scope and operation of the recovery. The deeds also stated by recitals the reason of these several assurances ; averring that there were not any settlements or wills in the knowledge of any of the parties.

There was also a separate conveyance by lease and release from the vendor to the purchaser, with covenants for the title generally, as against all persons.

As often as there is an *attendant term*, which was created upwards of sixty years since, the abstract ought to state the deed or will creating the term : and it is the practice, though this practice is attended with a heavy expense, and certainly is in many cases very unjustifiable, to deduce the title through the intermediate period.

No part of practice stands more in need of reform, than that which calls for such an expenditure.

If a title under the term for years be shown during a period of thirty or forty years, how can any defect in the title to the term well exist? The only instance of such defect which has ever occurred, is when the term vested in a person who is dead, and no representation to that person has been made out; so that there has been a dormant title without an adverse possession.

\*Generally speaking the courts will presume the existence [\*26] and the regularity of mesne assignments. [2 Black. Reports, 1228.]

Frequently the original deed creating the term is not in the custody of the present owner of the property which is sold. Under these circumstances the creation of the term does, in general, appear for the first time from the recital in some subsequent deed.

With a view however to the arrangement of the evidence of the title, and rendering the same more simple and intelligible, and also to display the skill of the person by whom the abstract is prepared, it would be more correct to state the creation of the term in the order of its date, and in this mode, viz; 1st April, 1700, *It appears in the recital of the deed of the day of afterwards abstracted, that, &c.* [here show the creation of the term.]

Afterwards, in abstracting the deed which contains the recital, it will be sufficient to refer to that recital in these or the like terms:

*After reciting the indenture of the 1st day of April, 1700, already noticed, p. by which the term of years was created, &c.*

This observation is equally applicable to the deduction of the title in its subsequent stages. Some further observations on this head will be offered in considering the subject of the arrangements proper to be made in abstracting the evidence of the title.

When the earliest deeds of which the vendor \*has the [\*27] possession are dated within the period of sixty years, and he relies on the *possession of some ancestor*, or of the testator himself, or of a former owner, as completing the evidence of the seisin for a period of sixty years, there should be an abstract of the leases, if any can be found, which were granted by such former owner; or for want of leases, it should be shown that the supposed owner was assessed to the land tax for these lands; or some other evidence, as recitals, stewards accounts of rents, old maps, local histories, old abstracts, cases submitted to counsel, and the like, should be produced to raise the presumption of ownership: and when estates have been *sold in parcels*, inquiry should be made for the more ancient evidences of the title, among the different persons who are the present owners of other parts of the property held under the same title.

In many instances the title has been traced to a proper source by this species of investigation. And even though the original deeds may not be found, the chances are, that in the progress of this inquiry, some authentic copies, or other evidence of the more

early deeds, will be discovered in the custody of some or one of the owners of the other property held under the same title.

*Deeds* and even *wills*, are sometimes found in the hands of those who represent the stewards, or the law agents of the family of the former owners, or of the gentlemen who have succeeded to the professional concerns of such law agents, &c.

[\*28] \*It would tend greatly to public convenience by facilitating such researches ; and be a profitable appointment to any individual, that all deeds, wills, &c. left or found in the hands of persons who have no connection with the property, or with the owners, or a table of their dates, and the names of the parties, and the description of the parcels, should be deposited in some public office. The existence of such office would quickly give to it abundance of employment.

The *covenant for the production of title deeds* also frequently throws some light on the state of the early title, and leads to the discovery of the deeds themselves.

On the other hand, as these covenants are constructive notice of encumbrances, and after a long interval, lead to an inquiry for deeds, &c. which have been converted into dust or ashes, the safe practice is, and it is the general practice in modern times, to take the covenant in a separate instrument ; and cases exist in which it is prudent to take several deeds of covenant for the production of the evidence of title ; each deed containing a different series ; so that one of the covenants may be given over to a future purchaser, without any notice of deeds, which had better, even for the sake of such purchaser, be kept out of view.

When an *estate is sold in parcels*, and the deeds do not accompany the title to the lands which are sold ; and even in other [\*29] cases, it is frequently prudent, in preparing title deeds, to \*show the commencement of the title of the vendor, with the intention, in the event of the loss of the title deeds, of supplying that loss by affording reasonable evidence, or in some cases, presumption only, of their operation and effect.

This is done either by a short recital of the purchase deed, settlement, or will, under which the owner, or his ancestor, or testator, became seised or entitled ; or it is done, at this day, as was the common practice in former times, by way of superadded description to the parcels, in a clause to this effect, "*Which said message, &c. were formerly the inheritance of* *who died*  
*intestate, and descended from him to* *his*  
*nephew and heir at law, who by his last will and testament, &c. devised the same to, &c.*" Or in this form, "*Which said message, &c. were formerly the inheritance of A. B. to whom the same were conveyed by indentures of lease and release, bearing date, &c. and made or expressed to be made between, &c. And the said A. B. by indentures of lease and release, bearing date, &c. conveyed the same to, &c.*"

Of course this clause may be varied *ad infinitum*, according to the circumstances which call for its application.



It remains only to be observed, that such recital or clause of description may be called in aid of the evidence of the title, so as to carry back the same to the period of the more early deed, of which notice is taken, and such \*history of the title is [\*30] deemed satisfactory by conveyancers, except in particular circumstances which call for more than ordinary caution.

It is even evidence against any person being a party to the deed, and who gives this history of the title.

As often as a title is derived by *grant from the crown*, as is the case with all rectorial tithes, &c. the original grant should be abstracted, for the purpose of showing that no reversion or remainder was reserved by the crown; but it is not necessary to trace the title through all the intermediate stages. At least this is the general practice and more prevailing opinion.

The reason for requiring evidence of the original grant from the crown is, that a reversion or remainder in the crown cannot be barred by fine or recovery.

Formerly the maxim of the law was "*nullum tempus occurrit regi*;" so that there was no limitation of time to bar the right of the crown.

By the statute of the 9 George III. chap. 16, the crown is disabled to sue or implead any person for any manors, lands, or hereditaments, &c. where the right hath not or shall not first accrue and grow within sixty years next before the commencing such suit, &c. and the subject is secured in the free and quiet enjoyment thereof, as well against the crown, &c. as all persons claiming any estate or interest therein, by colour of any letters patents or grants upon suggestion of concealment, &c. wrongfully \*de. [\*31] taining, for which judgment hath not or shall not be given to the crown within sixty years before the commencing such suit.

Several provisos and exceptions will be found in the act.

It is a great drawback on the utility of this statute, that no purchaser can have the benefit of the enactment, if the lands he has purchased are parcel of an *honor*, &c. and such honor, &c. has been put in *charge* within the limited period. There are few farms, &c. which are not parcel of an honor, &c. which remains in the crown, and is continued in charge; and entire honors, &c. are of too much importance to be obtained by *intrusion*.

In an abstract of title concerning *advowsons in gross*, the title should be stated from as remote a period as circumstances will admit, and *presentations* by the successive owners should be shown, as the best evidence of seisin. The title to advowsons has been subjected to certain statutes of limitation; but these statutes have been repealed, so that a title may be outstanding after a seisin for more than sixty years.

It frequently requires and merits great consideration, at what period the commencement of the title should be taken up, when the seller is in possession of title deeds which carry back the evidence to a very remote period.

On the one hand there is a want of candour, not to say of [\*32] honesty, in withholding any \*material information from the purchaser, since a title may be radically defective if all its circumstances were disclosed, although it may, by the abstract, be made to appear perfectly good.

On the other hand, by carrying back the evidence of title beyond a reasonable period, the vendor may involve himself in difficulties which may not be easily removed ; especially if the abstract should fall into the hands of an unwilling purchaser, a troublesome or timid solicitor, or of a conveyancer who will not be satisfied with probabilities, and with those presumptions on which the more candid and more experienced gentlemen of the profession, feel it a duty to the public, and for the interest of their clients, to rely. And let it never be forgotten, that many an advantageous bargain has been lost, and the convenience of a purchaser sacrificed, by objections and difficulties which were more ingenious than solid ; more cautious than wise.

In cases of this sort, the duty of the solicitor appears to be, on the one hand, not to disclose the title by the abstract, beyond the common and ordinary rules of practice, either from mistaken candour, or from the still more culpable motive of extending the abstract, for the purpose of increasing his fees.

On the other hand, if the solicitor be aware of any defect in the title, he ought not wilfully to conceal the same.

[\*33] \*It is his duty to disclose all the deeds and wills which may raise the question, and to leave the purchaser's solicitor or counsel to his own discretion in deciding for himself.

In particular, when the solicitor for the vendor knows that some of the parties are in a state of mind which renders their sanity, &c. or the fact of their majority or legitimacy doubtful, he ought not to withhold from the purchaser the means by which the fact may be investigated, unless the parties are known to the purchaser or his solicitor, and the purchaser or his solicitor has equal information with the vendor.

But as it often happens that a defect in the title disclosed to a purchaser leads to a claim by a person who may assert a title founded on this defect, it is a very prudent caution on the part of sellers, to have their title thoroughly investigated by their own counsel, before they offer their lands for sale ; so that they may be satisfied there is not any reasonable chance of exposing their title to a successful claim, or even to a troublesome and expensive litigation.

Nor is this the only advantage to be derived from such previous investigation of the title, under the advice of those who are conversant with the subject.

The formal difficulties with which the title may be attended may be pointed out ; the necessary means may be taken to remove the same ; and if they be found insurmountable, the precise circumstances of the title may be [\*34] \*stated by the particulars or conditions, or contract of sale ; and stipulation may be in-

roduced into these particulars, or into the conditions or contract, so as to preclude the purchaser from all right to object to the title on these grounds.

Such stipulations seldom injure the sale, or materially affect the price; and they prevent the infinite trouble and the heavy expense frequently incurred for want of this precaution. Such objections are too frequently taken, or if not originally taken, are insisted on for the purposes of delay, or to impose on the seller terms to which he would not otherwise submit: and they involve the seller sometimes in considerable difficulties, and not unfrequently in actual ruin and bankruptcy, by depriving him of those means by which he expected to discharge engagements, into which he had entered on the faith of this resource, which thus fails him.

Should a vendor think fit to deliver the deeds to a purchaser, as a substitute for an abstract, the purchaser would have a right to require the vendor to take back the deeds, and insist on an abstract at the vendor's expense.

Should an abstract be withheld, its delivery may be compelled in equity, under a bill for specific performance; and deeds, &c. which are suppressed or withheld, may be brought to light by interrogatories in the bill, or under the usual order, and the interrogatories exhibited under that order.

\*A reluctant vendor may make the title appear ineligible [\*35] or defective, merely to induce a purchaser to forego the specific performance of a beneficial contract.

A person playing this game, merits severe animadversion, and even punishment; and every means should, for public example, be taken to bring forward the real state of the title. And a contract abandoned under a fraud thus practised, may, it should seem, be revived at a subsequent period, on a detection of the fraud. The existing equity, under the contract, would bind a purchaser, with notice of the grounds on which the contract had been abandoned.

On the other hand, when a purchaser insists on specific performance, and at the same time, for the sake of delay, and to make use of the money in trade, or in any speculation, requires information not in the power of the vendor; or requires the concurrence of persons not under the vendor's control, the vendor should file a bill to compel the purchaser to make his election, to accept the title as it stands, or to rescind the contract.

Many purchasers have by these means been compelled either to pay the price, or abandon the contract.

*\*Of the Form of the Abstract.*

[\*36]

EVERY abstract should have a head or title.

This part of the abstract should propound the names of the persons whose title is to be considered, the estate or degree of interest they have, and the lands to which the attention is to be directed, and names of the parishes and county in which the lands are situate;

and as far as it is practicable, connect the modern with the ancient description of the parcels :

The form may be to this effect :

An abstract of the title of *A B* to the fee-simple and inheritance of the manor of \_\_\_\_\_ in the county of \_\_\_\_\_

\_\_\_\_\_ ; or a farm, or close in the parish of \_\_\_\_\_ called \_\_\_\_\_ ; or to a farm, &c. or close, &c. in the parish of, &c. \_\_\_\_\_ containing, &c.

\_\_\_\_\_ formerly parcel of a farm called \_\_\_\_\_ or to a farm, &c. formerly called \_\_\_\_\_ and now called \_\_\_\_\_

When the lands are held *for lives*, or for the residue of a *term of years*, then the head of the abstract should be in this form :

An abstract of the title of \_\_\_\_\_ to a farm, &c. called \_\_\_\_\_ situate in, &c. for the *lives* of \_\_\_\_\_

\_\_\_\_\_ ; or for the residue of a term of \_\_\_\_\_ years ; or the residue of a term of years, now *determinable on the death of* \_\_\_\_\_

These particulars are to be given by way of intimation, [\*37] to direct the attention of the \*solicitor for the purchaser and the conveyancer, to the specific lands which are the subject of the title to be considered by him, so that he may read every part of the abstract with a due application to the parcels.

Of course the head of the abstract should be varied, in point of form, as circumstances may require ; thus directing the attention to those points which are most material and prominent.

And when the lands are of *copyhold tenure*, or *customary freehold*, or are held in *gavelkind*, or in *borough English* ; or there is any other customary mode of descent or peculiarity, it should appear in the head of the abstract.

And as to lands in *Kent*, which are presumptively all of gavelkind tenure, it should be noticed that the lands have been disgavelled, if such be the fact.

Sometimes an abstract is prepared with a view to show the title to divers farms ; and this abstract is made for the use of different purchasers, who have purchased different farms, or different parcels, so that one abstract is made to answer the purpose of several purchasers.

This is a slovenly mode of transacting business, and frequently leads to infinite trouble to the conveyancer, as his attention is directed to points in no ways material to his client.

In cases of this sort, a particular of sale, with an intimation of the lands which are purchased, or a copy of the contract, should accompany the abstract ; or, which is still preferable, the [\*38] \*solicitor for the vendor or purchaser should, by a note at the head of the abstract, or by some indorsement on the same, state the particular parcels purchased by his client ; and those parts of the abstract which are relevant should receive some mark of distinction ; or rather those parts which are immaterial should be noticed as such, or cancelled. It would, in many cases,

be well worth the trouble and the expense that the solicitor for the purchaser should frame a new abstract out of this heterogeneous mass.

But the practice of encumbering the margin of the abstract with notes, criticisms, &c. or any other observations, except material facts, should be avoided. Such observations are not in their proper place; they distract the attention of the conveyancer, and they interrupt that train of reasoning and connection of facts, which must be pursued to do justice to the client. Observations (if any are to be made on the law, &c.) should be at the end of the abstract, or in a separate statement.

In deducing the title to advowsons, the presentations should be shown at the head of the abstract. It may be thus intitled: "A statement of the presentations, with the names of the patrons, and of the clerks, presented during the period of this abstract."

Thomas Squire, clerk, presented by Thomas Nicholson, March 12, 1690.

Thomas Dalton, clerk, presented by William Cartwright, March 4, 1740.

\*E. Cartwright, clerk, presented by William Cartwright, [\*39] November 2, 1749.

N. Stow, clerk, presented by Catherine Cartwright, spinster, July 31, 1794.

Edmund Cartwright, clerk, presented by Catherine Cartwright, spinster, April 2, 1802.

Thomas Raddish, clerk, presented by Duke of Norfolk, January 17, 1805.

Care should be taken that these presentations are warranted by the title, as disclosed in the abstract.

In general the abstract should state the different deeds and wills of which the title is constituted, in the order of their dates.

Sometimes it happens that a will has been revoked by a subsequent settlement, recovery, fine, or other assurance.

In this case the more prevailing practice is to state the settlement in the first place, and the will in a subsequent part of the abstract; and then if the conveyancer should not pay particular attention to the order of the dates, the question of revocation would not be raised in his mind. This oversight may happen even to the most cautious person, unless he has formed the habit of paying especial attention to this point.

In fair and candid practice the will ought to be stated according to its date, and consequently as preceding the settlement, &c.

*\*Arrangement of Abstract.*

[\*40]

HOWEVER there are many cases in which it is even eligible, and almost a duty on the solicitor, to simplify the evidence of the title, by giving a different arrangement to the abstract. This is the case, as often as the abstract relates to different parcels of land, or dif-

ferent terms which have been purchased at different times, and have ultimately centered in one person. And it is also the case, as often as a farm, or other property, has vested in several persons as tenants in common, co-parceners, or even as joint-tenants, who have severed the tenancy, and there is, through a long series of years, a different deduction of title to the different shares.

This mode is equally eligible, whether the different shares have already united in one person, or they are, on the present occasion, to be purchased from the different part-owners. In instances of this sort it is also proper to give different heads to the different parts of the abstract ; *for example ;*

*As to the farm called A, purchased of B.*

*Or as to the third part or share of A.*

And when two or more farms, or two or more shares, become vested in the same person, and the title, applicable to the several farms, or the several shares, is united, there should be a new head directing the attention to this fact ; thus,

*As to the farm called A, purchased of C ;*

*And the farm called B, purchased of D.*

[\*41] *\*Or as to the third part formerly of A,*

*And the third part formerly of - - B.*

Of course the abstract should in every instance be varied in this respect according to the circumstances ; and if a will be so dated that it is prior to some of the purchases, and consequently inoperative as to them ; while it is subsequent to other purchases, and governs the title to the parcels so purchased ; a memorandum ought to be made to express this circumstance.

It should be at the end of each purchase deed ; and to this effect :

The will of \_\_\_\_\_ was made prior to this purchase ; or subsequent to this purchase ; or the memorandum should be at that part of the abstract which introduces the will, and be to this effect ;

‘ This will was prior to the purchase made in the year \_\_\_\_\_ .’

### *Objects of Abstract.*

THE object of every abstract is to enable the purchaser or his counsel to judge of the evidence deducting the title, and of the encumbrances affecting the title.

Every title involves in itself the question of legal and beneficial ownership.

On the one hand, it is in vain that there is a good title at law, if that title be bad or defective in equity.

On the other hand, it is not sufficient that there is a good [\*42] title to the legal estate, or to \*the equitable estate, if it be encumbered with *judgments, legacies, debts to the Crown, or other charges* to its value ; for in proportion to the extent of

such encumbrance will there be a reduction in the actual value of the interest of the vendor.

In short, every abstract should describe whatever will tend to enable a purchaser, or his counsel, to form an opinion of the precise state of the title at law and in equity, together with all chances of eviction, or even of adverse claims.

And these points should be kept in mind in preparing the abstract of title, and also in comparing the same with the documents or evidences of the title.

In the following observations an attempt will be made to direct the attention to those different points.

### *Substance of Abstract.*

EVERY abstract ought to consist of a short statement of the material parts of the deeds, wills, and other documents or writings, if any, and records and private Acts of Parliament, and even of public Acts passed for private purposes, which can in anywise implicate or affect the title.

To these should also be added such facts as fill up the interval of title, as descents, deaths, marriages, births, burials, and other circumstances generally called *matters in pais*; or facts which may vary the state of the title, as happens in titles which depend on special limitations or \*contingencies, in which the right [43\*] is made to arise upon some fact or event; and also in titles by descent, &c.

All facts which are stated should be stated correctly, and the seller should be prepared to verify or authenticate them by legal evidence; and the purchaser's solicitor should take care that such evidence will be within the power of his client.

And as often as a title depends on a descent from a remote ancestor, a pedigree should accompany the abstract; and it is the duty of a solicitor, on the part of a purchaser, to take care that the pedigree should be authenticated; not only by such evidence as would be deemed *primâ facie* proof in a court of law of the title of the supposed heir, but such evidence as it would be incumbent on him to give for the purpose of supporting the title in the event of an adverse claim.

This is more particularly the case when the vendor is not in possession, but is to transfer a remainder, a reversion, or other remote interest. However no case of this description is to be considered as governed by any precise rules. Circumstances will and must occasion the necessity of exercising a discretion in this respect. The material distinction to be kept in mind is, that a man may be able to give *primâ facie* title of being heir, while in point of fact he is not heir.

The observations which have been made, are to be considered as applied to a title which of a recent date depends on such extraneous facts; \*for if these facts arose at a very distant [44]

period, and the title was claimed on their foundation, and there has been a possession consistent with this state of the title, then the possession furnishes the necessary evidence of the facts, or rather such a presumption of them as, in many cases, may be safely relied on ; and the cautions which are recommended are to be adopted only in proportion as the facts admit of more certain and decisive proof.

For instance, if it appear that thirty or forty years ago, *A* died, leaving *B* his heir at law, and that *B* entered and enjoyed without interruption ; and that he sold, and that the purchaser entered, and had peaceable possession ; no one, except under extraordinary circumstances, as an asserted claim, ever thinks of requiring any evidence to prove the fact that *B* was the heir at law.

Of all titles depending on descent, those to be viewed with most jealousy, and accepted with the greatest caution, are those in which a *maternal heir* claims the right of succession ; and enters into possession on the ground that there is a failure of paternal heirs.

Evidence of extinction or failure of inheritable blood, in the line of the father, by reason of *attainder*, or *alienage*, or *bastardy*, may exempt the title of the maternal heir from difficulties or suspicion.

But in all other cases, though the paternal heir may not have been found ; and though the maternal heir may have ob-  
 ✓ [\*45] tained undisturbed \*possession ; or though he may, even against a tenant, or an *abator*, have established a title by the judgment of a court, yet it does not follow that his title is good. The probabilities, indeed, are, that it is defective. In the nature of things there must be a paternal heir, though he neither has been or can be discovered.

This probability is increased in proportion to the number of progenitors, whose issue must have failed, before there can be an extinction of inheritable blood on the part of the father, or other paternal ancestor.

The like difficulty occurs when the *father*, or *grandfather*, or *great grandfather*, is the purchasing ancestor, and some one who derives a title under a very remote and distant branch of the family, claims and even establishes a *prima facie* title as heir. The chance of a more immediate heir renders caution necessary.

Experience proves, that in titles of this description, more remote heirs obtain the possession ; more immediate heirs recover against them ; and they, in their turn, are evicted by persons who prove themselves to be nearer in the line of inheritable blood.

Titles, involving these circumstances, have generally been fortified by a fine with proclamations. Such fine and non-claim certainly add to the security of the title. But disabilities may have protected the actual heir from the bar of the statutes of non-claim on fines.

[\*46] Few titles are therefore to be accepted with \*more caution than a title by descent asserted by an heir, in a remote degree, from the first purchaser, or the person last seised.



So if a limitation be made in favour of the first son of *A* in tail, and a person claiming to be the first son has either in the lifetime of his father, together with his father, or after the death of his father, and alone, suffered a recovery, and the possession has been consistent with the title derived under that recovery, the recognition by the father, of the son, as his first son, or a continued possession for several years, is considered as reasonable evidence of the fact, that this son was the first son. But in proportion as the title is of a modern date, caution may be even necessary in this case; for it has more than once happened that such son has been *illegitimate*, and the fact of *illegitimacy* has been suppressed. The certificate of baptism, and an affidavit of legitimacy, are the proper precautions against a surprise in this particular.

In some cases it has happened that the limitation has been confined to the first son, without extending to the second son: and the person who, in point of fact, was the first son, died at a very early age; and his death has been cautiously concealed for the purpose of enabling the second-born son to assert a title to the estate. In such case no register of baptism will be found.

This happened in a county near the metropolis, and the fact was never discovered till the second-born son was about fifty years of age, \*and then, like most other cases of fraud, it [\*47] led to his ruin, or at least hastened it.

In many cases also, more caution than is generally adopted is necessary to ascertain the fact, that the person who claims as heir, or as the eldest or other son, is legitimate. In various instances titles have proved defective in consequence of taking this for granted, or, in short, from the inability to disprove the fact.

And when titles depend on recoveries suffered by an heir in tail, the attention is not so frequently directed as it ought to be, to ascertain that the freehold was not outstanding at the date of the recovery, in a tenant by the curtesy, or in a tenant in dower.

It is observable, however, that a mere title of dower does not raise any impediment to the validity of a recovery.

It also sometimes happens, that *infants* are married with the consent of guardians appointed by the ecclesiastical court, instead of being married with the consent of guardians appointed by the court of chancery. Such marriages are void, and of course the issue *illegitimate*.

A case of this sort occurred, in which the parties were apprised of the law before the birth of the child who was to take the first estate tail under the marriage settlement, and from a mistaken delicacy, no entreaties could prevail on them to be re-married, though both were adult.

A child was actually born illegitimate: but \*fortunately [\*48] for him he died while of tender years; but yet there is no doubt if he had lived to attain the age of majority the circumstance would have been buried in oblivion, or at least for a long period of time, and he would have asserted a title to the estate,

and the title have been accepted under a conveyance from him, without any inquiry into his legitimacy ; since all the neighbours, and among them the purchaser, would have assumed the regularity of the marriage, from habitual belief that the father and mother were husband and wife legally married.

In instances of this sort, local knowledge misleads, by substituting belief in the place of *evidence*.

Entries by *disseisin*, *abatement*, *intrusion*, &c. may also materially affect the title, and when they have existed they should be stated.

Wills may be revoked, and consequently become inoperative by such *disseisin* ; and *re-entries*, &c. may also be equally relevant, by restoring the effect of the will : and they should be stated when any conclusion may depend on them.

The state of a title by descent may be varied by such entry, &c. and a *possessio fratris* ; or the nature of the remedy, and consequently the period of bar under the statute of limitations, may be changed ; for instance, if there has been an abatement or intrusion,

and it is avoided by entry, and an actual seisin acquired, [\*49] and there is a subsequent *disseisin*, a writ of \*right may become the remedy, instead of a writ of entry sur abatement, or sur intrusion, &c.

### *Of the Form of the Abstract.*

The more immediate form of the abstract will now be the subject of consideration. For this purpose the observations will be applied,

- 1st, To deeds.
- 2dly, To records.
- 3dly, To acts of parliament.
- 4thly, To commissions of bankrupt.
- 5thly, To wills and their probates.
- 6thly, To administrations.
- 7thly, To decrees.
- 8thly, To judgments ;

Since these are the several documents from which an abstract is generally prepared. It is to be observed, however, that *mere agreements* are to be abstracted in like mode as deeds ; and therefore must be considered as falling under that head of division.

Every formal deed consists for the most part of several particulars or clauses, viz.

- 1st, The date.
- 2dly, The *style* or *character* of the deed.
- 3dly, The names of the parties.
- 4thly, The recitals.
- 5thly, The testatum, or operative clause ; and this clause is again subdivided into several parts, viz.

- 1st, The part which expresses the consideration.

\*2dly, The name of the grantor, words of request, &c. [\*50]

3dly, The operative words of grant ; and

4thly, The name of the grantee.

5thly, In some cases, a reference to a lease for a year, as in releases founded on a previous lease for a year.

6thly, The parcels, with their description ; and either with or without an *exception*.

7thly, The general words, and the clauses of reversion, estate, deeds, &c.

8thly, The habendum, or clause limiting the estate.

9thly, In some cases a reddendum.

10thly, In some cases a declaration of uses.

11thly, In some cases a declaration of trusts.

12thly, In some cases a condition or conditional limitation, by way of shifting or springing use ; or a clause of agreement for redemption in equity ; or some other special agreement which may affect the title in equity, if not at law.

13thly, Powers.

14thly, Covenants for the title, or other covenants which may affect the title, and either with or without exceptions introduced into these covenants.

15thly, The execution.

16thly, The attestation.

17thly, The receipt.

In this arrangement, a simple deed is \*contemplated ; but [\*51] many deeds may be considered as compound ; consisting of various testatum clauses, and consequently with a repetition of all or several of these clauses.

This is particularly the case in deeds which convey freehold and leasehold lands ; or freehold or leasehold lands and personal estate ; or which convey the inheritance, and also assign a term or terms for years in the same lands, or release any encumbrance affecting the property.

As often as a deed consists of these various parts, the abstract must state these parts, as far as they are relevant and material to the title under consideration.

There are also some cases (as in *articles* for a settlement, &c. and agreements creating an equitable lien), which do not contain the different formal parts already noticed ; or at least do not exhibit them in the order they are enumerated ; but they necessarily have these particulars in substance, or in construction of law, though they may not have them in point of form ; for every deed or instrument, *inter vivos*, which is effectual at law, or in equity, must, in terms or in substance, have

1st, An agent, grantor, or party contracting.

2dly, A patient, grantee, or person with whom the contract is entered into.

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3dly, The parcels, or subject, about which the grant or contract is concerned ; and

4thly, The terms upon which that grant is made, or contract is entered into.

[\*52] \*1st, *As to the date.*

The date should be stated, and for the facility of reference, it is generally given in the margin ; and when an assurance consists of several parts, as in the instance of a lease and release, the date of each instrument should be stated.

2d, *As to the style or character of the deeds.*

It is also usual, in introducing the different parts of a deed, to state the mode of its operation, thus, " By indenture of lease. By indentures of lease and release. By indenture of feoffment. By indenture of assignment. By articles of agreement. By indenture of bargain and sale inrolled," or the like.

And when a deed consists of several operative parts, it is also usual to refer to its different operations in these or the like terms, " By indentures of lease and release, or indenture of lease, and indenture of release and assignment," &c. This exordium brings the abstract, in effect, to state, that by indenture, &c. a particular person, or certain persons, did grant, &c. or that by indenture, &c. after reciting, &c. a particular person, or certain persons, did grant, &c. And this is the general form adopted in practice. Sometimes, however, deeds are abstracted in this form :

" 1st May 1804, an indenture, or indentures of lease and release, made, &c. whereby, after reciting, &c. *A. B. did, &c.*" but though this mode is sufficient for the purpose, the former mode ap-  
[\*53] pears more correct, and is to be preferred, as \*being the form generally adopted, and as guarding against the appearance of singularity.

Under this division it will be proper to notice that in case of a simple abstract, or an abstract concerning one farm, or one estate only, carried on by a regular series of deeds, the deeds, wills, &c. should be abstracted in the order of their dates. But in compound or complex abstracts, as in the instance of several farms purchased at different times from different persons ; or a farm which is subdivided into different shares, which become the subject of different sales, mortgages, settlements, &c. the arrangement should keep the title to each farm, or each share, in a connected series, as long as the title remains distinct. On this point a former observation, directing the mode of arrangement of the abstract should be consulted.

3dly, *As to the names of the parties.*

Every well-penned deed names the grantor and other parties, with their additions, viz. the places of their residence, their professions, callings, &c. and sometimes, indeed frequently, it adds the description of their characters, as heir at law, executor, &c. trustee, &c. or surviving executor, &c. surviving trustee, &c.

In abstracting ancient deeds it is not necessary to do more than

state the names of the parties, without adding the places of their residence : but it is always proper to add the descriptive character in which they acted, namely, as heirs, executors, &c. ; since this description \*affords, at one view, an intimation of the [\*54] character in which they conveyed, &c. and connects the title with the former part, if any, of the abstract ; and if there be not any former part of the abstract, it may lead to an inquiry which will tend to elucidate the title, or will induce the production of evidence, which will have that effect.

There are also many cases in which it is proper to add the additions of the parties, either for the purpose of distinguishing them from other persons of the same names, or affording the information necessary to a search for their wills, the birth of children, or the like circumstances connected with their residence.

This is more particularly important, in reference to persons through whom a title must be derived, with a view to some act to be done, to render a title complete by supplying a defect in the same, or investigating a pedigree.

In some deeds a great number of persons are introduced as parties, and the acts done by many of them are immaterial to the title under consideration.

As often as this happens these parties should be named very briefly, or there should be merely a reference to them in these or the like terms, "several other persons, of the 2d, 3d and 4th parts."

And to render a reference to the different parts of the abstract more easy and more obvious, it is very eligible to arrange the different parties in different lines, thus,

\*Between,

[\*55]

*A. B.* of the 1st part,

*C. D.* of the 2d part,

*E. F.* of the third part, &c. &c.

For it may be justly observed, that whatever assists the eye to read, or to collect the facts, will leave the mind more free to ascertain the effect of the deeds, and to form a correct estimate of the connexion of the facts with the former and subsequent parts of the transaction.

In this part also of the abstract, if it has not been done in a previous clause, it is very convenient for the information of the person by whom the abstract is to be perused, to aver such facts as may tend to elucidate the title in the progress of considering it ; for example, *Between A. B., since deceased ; or A. B., who was the heir at law ; or was the surviving child of, &c. ; or who had then survived A. B. and C. D. his co-trustees ; or who is executor, &c., or who is a trustee, &c.*

This however is proper, only when the information is not introduced into a former part of the abstract, or will not occur in its proper place in the recitals of the deed in question.

These statements should be in brackets, that they may appear as *averments*, distinguished from statements in the deeds ; since, as

statements in the deeds they would receive more credit, and be allowed more weight than they would receive, or be allowed, when they are stated by way of averment, for which proofs are to be adduced.

[\*56] \*4thly, *Of the recital.*

Immaterial matter contained in the recitals of a deed should not be stated in the abstract ; or should be stated as concisely as possible. On the other hand, recitals, which may materially affect the history of the legal or equitable title, should be fully expressed.

On the other hand, it is pregnant with inconvenience to introduce recitals in this or the like phrase : After reciting *among other things*, without adding, "not material to the present title," or some expression to that effect.

The recitals generally deemed material to be introduced fully into the abstract are of former deeds, &c. not in the power of the vendor, and which show a deduction of the evidence of the title, so as to carry it back to a more remote period ; descents, and other facts which fill up those parts in the chain of evidence which are wanting.

In transactions of small purchases, in which the lands were *parcel* of a large property, the nature of the transactions leads to the conclusion that the deeds remain in the hands of the former proprietor, or were delivered to the purchaser of a larger estate ; and such recitals are, with great reason, as hath already been noticed, considered as affording a reasonable presumption of the correctness of the statement ; especially when taken from deeds executed at a distant period ; say thirty or forty years.

[\*57] Such recitals are also relied on when there is \*reasonable evidence that the title deeds themselves have been destroyed by fire, or casually lost. In titles derived under deeds of a more modern date, and which are in existence, it is proper that reference should be had to the deeds themselves, either by the solicitor for the purchaser, or some one employed on his behalf, that the purchaser may be satisfied that the abstract is correct.

In settlements founded on marriage articles, the articles should be fully abstracted, as far as they are material, and are recited in the settlement ; unless the articles themselves are previously abstracted. This statement is generally given as a recital in and as part of the abstract of the settlement.

Another and more eligible mode, is to give the recital, as it occurs in the settlement, by way of previous statement, so as to precede the abstract of the settlement ; but then this part of the abstract should be stated, as taken from a recital in the settlement ; thus, *in the settlement next abstracted there is a recital to this effect, viz. By indenture, &c.*

Deeds of trust, on which another deed is founded, are open to the same observation. So are all other agreements which may materially affect the title at law or in equity.

A distinction however may be made between articles or trusts which are from the period of their date relevant to the title of those of identical lands which are the subject of the abstract; and \*those articles and trusts, (as articles and trusts under the [\*58] directions of which the lands are purchased), which do not affect the title, until the lands are purchased or settled.

Articles and trusts, of the latter description, seem to fall most naturally into the order of being stated in the abstract of the deed in which they are recited; or they should be inserted immediately before the purchase deed executed in pursuance of these articles or trusts.

Care however must be taken, even when the articles are recited, that the effect of the articles has been correctly given.

For this purpose the original articles should, if circumstances admit, be inspected; and if the recital be incorrect, the purchaser's solicitor should, by a rider, or by a correction of the abstract, supply a full and faithful statement of the material parts of the articles, as far as these parts are omitted. In most instances it will be found more convenient to cancel the former notice of the articles, and substitute in its place a correct abstract of the articles.

When an indenture of a former date is recited in a deed of more recent date, then, if no statement of the recited deed is introduced into a former part of the abstract, the recital should be given at large, as to all the material points. But as often as the deed so recited is introduced into a former part of the abstract, there should be a short reference to the deed, and this will be sufficient, except so far as the recital \*does, by averments, [\*59] or other means, disclose new and material information, and then such additional facts should be abstracted.

The general mode of reference to such recitals is in this form:

After reciting the indentures of the                      and                      days of  
and                      and                      day of                      .

And it is in all cases proper that such or the like reference should be made.

And it is attended with convenience to have the reference to the different deeds arranged in columns, thus:

After reciting the indentures of

1st and 2d May 1700.

2d and 3d April 1720, &c.

4th and 5th April 1721, &c.

An additional convenience arises, in long abstracts, from a reference to the page in which the recited deeds are to be found: and, under the like circumstances, it greatly assists the memory, and preserves the chain of thought, and the due application of the judgment; to give a short reference to the operation of the deed by these or the like terms:

After reciting the indenture of the 1st and 2d May 1700, p. 4.  
(being the settlement made on the marriage of *A. B.* with *C. D.*)

*some contingency* by which one estate was to determine, and another take effect ; deaths under age, or before portions become payable ; deaths of husband and wife without having had, or without having left, issue ; titles by descent, showing the death of the owner, and the *succession of an heir* ; and frequently the *different descents* to different heirs in succession ; *wills*, and the *devises* contained in them ; the *probate* of these wills, and the *courts* in which these wills were proved, and the time of probate (both which circumstances are useful ; partly to facilitate a search for the will, and partly to show the time of the death of the testator, or rather to show that he was dead before a given time ; ) also *intestacies*, *administrations*, and the like ; also *settlements* made of certain lands to certain uses, for the purpose of complying with the terms of some *power* on which the title may depend : in short, these and all other circumstances which may be important to the title, either with a view to its deduction, or to show that it is free from encumbrances, should appear on the abstract.

Also if an encumbrance appear from a recital, it is the duty of the solicitor who prepares the abstract to state such encumbrance, even although it may not be existing ; and if he  
[\*65] \*should omit this part of his duty, the solicitor for the purchaser should take care that the omission shall be supplied.

For it is the province and duty of the conveyancer ultimately to consider, whether such encumbrance is or is not material, and whether there are any grounds for presuming that it has been released or discharged.

As notice of a deed is constructive notice of all its contents, the purchaser becomes implicated in the transaction ; and it is fair that his counsel, or the person on whose judgment he relies, should have an opportunity of considering how far such encumbrance affects the title.

In all these and the like cases, liberal, and even honest practice, imposes on the solicitor by whom the abstract is prepared, the duty of supplying rather more information than may, in his own judgment, be material, than the latitude of withholding any fact or circumstance which may give a turn to the title ; or show an encumbrance which once existed, however strong he may consider the presumption in favour of its having been discharged or satisfied, or barred by the lapse of time.

The *contract*, or the agreement on which the deed is founded, should, in general, be shortly stated ; and in many cases it is material to state the contract fully, as an important part of the abstract.

This contract is particularly relevant when it is made by  
[\*66] or with a person who is dead ; so \*that there is a conversion of the property from real into personal estate, and the mode of paying and receiving the purchase-money is varied by this change.

For instance, if *A*, who has the fee, contract to sell to *B*, the interest of *A* is, in the view of a court of equity, and according to the



rules of that court, converted into personalty; and if he die his heir is considered as a trustee for the purchaser, and the executor of *A* is entitled to the purchase-money. On the other hand, the purchaser, or his heir, or (if any) devisee, is entitled to have a conveyance of the land; and if the purchaser die, then, unless the contrary is directed by the purchaser, the purchase-money must be paid by his executor, out of the personal estate, for the benefit of the heir or devisee.

The same point, and also the date of the contract, are material, when there is, first, a contract, and secondly, a will, or a codicil republishing a will; since the date of the contract may alter the state of the equitable title, as between the heir and devisee.

In order, however, that this change may be effectual, as between *heirs and executors*, it is essential that the purchaser should have accepted the title in his lifetime, or that the vendor should be in a situation to make such a title as a court of equity would have compelled the purchaser to accept.

For should the title prove defective, the heir at law of the purchaser, or the devisee, if any, \*of the will of the purchaser, will not be at liberty to waive the objections to the title, so as to charge the executor or administrator with the price. But the executor or administrator may interpose and resist specific performance, on the ground of a defective title, and thus keep the amount of the purchase-money as part of the personal estate, instead of applying it, for the benefit of the heir or devisee, in performance of the contract. In *Broom v. Monk*, 10 Ves. j. 597, the purchaser had directed the contract to be carried into execution, without having in his lifetime accepted or approved the title, and yet the executor successfully resisted the claim of having the purchase completed out of the personal estate. But although the executor resisted specific performance, the *devisee*, and if there had not been a devisee, then the *heir* might have paid the price, and insisted on specific performance.

On this point various distinctions present themselves, and are deserving of notice in this place.

The effect of a contract as against the vendor, supposing the contract to be such as would be carried into specific performance, is,

1st, To convert the land into money, as between the *representatives*.

2dly, To *revoke the will* of the vendor in equity; but unless a conveyance shall be made in the lifetime of the vendor, the will of the vendor will remain in operation at law, and the \*conveyance must be taken from the *devisee*, and the purchase-money paid to the *executor or administrator* of the vendor. [\*67]

On the other hand, on the part of the vendee or purchaser.

1st, The money will belong to the vendor, and the land will, in equity, belong to the purchaser.

2dly, This interest in the land is devisable, and will pass under

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the general words, "all my real estate."—See *Seston v. Slade*, 7 Vesey, 274, and 12 Vesey, 114.

3dly, Unless devised by a will subsequent to the contract, the right to the benefit of the contract will *descend* to the heir. *Gas-karth v. Louthier*, 12 Vesey, 114.

4thly, In either case, unless the contrary be directed by the purchaser, the purchase-money must be answered out of his personal estate, as far as there are assets for the purpose.

5thly, Though the purchaser take a conveyance after the date of his will, yet his will remains operative in equity on the equitable ownership, unless there be a new modification of the ownership by the conveyance. But the will, whatever may be its language, cannot transfer the legal estate, unless the will be made subsequent to the conveyance, or be republished after the conveyance shall be taken.

In short, whatever will tend to elucidate the title either at law or in equity, or may show in what manner the purchase-  
[\*69] money ought to be \*applied, and if circumstances will permit, that it has been duly applied, should be stated from the recitals, though the recitals are not evidence of the fact when the fact requires proof, as often as it cannot be stated from the original deed, &c. and as near as may be, these circumstances should be given in like manner as they would have been stated, from such deed or will, if the abstract of the deed or will could have been given from the original instrument.

#### *Of the Testatum, or Witnessing Clause.*

AND first of the part which expresses the *consideration*.

The consideration should be stated in the abstract of every deed, either concisely or fully, according to the circumstances of the case; for instance, when *A*, who is the absolute owner, sells to *B*, it is sufficient to state that *in consideration of 100l. paid to A by B*, with the addition, if such be the language of the deed, *for the absolute purchase, &c.*; but as often as some trust, or power, requires that the money should be paid in a special manner, then that part of the deed which expresses the application, is to be detailed, and yet the statement without evidence would not prove the due application, unless the receipts of the trustees are to be discharges. In cases of that sort, the language of the clause should be fully detailed, so as to show that all the requisites of the trust, or circumstances of the power, have been observed; for example, in  
[\*70] \*consideration of                      paid to the said *A B*, by *C D*,  
at the instance and request, &c. of the said *E F*, in full for the absolute purchase, &c. or *in satisfaction and discharge, &c.*, and to be *held and applied, &c.*; and in all these and the like cases, the language of the deed should be closely pursued in the abstract.

Also when a deed is made in consideration of money payable out of a particular fund, as trust moneys, &c., and a trust is implied

from the mode in which the money is paid, or arises from the fund out of which it is taken, this circumstance should be stated in the abstract.

So when a deed is made for a *particular purpose*, as for docking and barring all estates tail, &c. or for settling, &c. these objects should be noticed.

In general a short intimation of the professed object is sufficient: This clause is, for the most part, given more at length than is necessary for ordinary cases.

Under particular circumstances, however, (as where a settlement is made for a jointure, and in bar of dower, &c.) this part of the object should be distinctly stated, especially if it be the only part of the deed which can be used to exclude the wife from dower.

*Nominal considerations*, as ten shillings, and the like, should be noticed very briefly; nor is it essentially necessary that they should be expressed in any case, except in bargains and sales, in which it is the essence of the deed, \*with a view to its operation [\*71] in that particular mode, that there should be a *pecuniary*, or at least a *valuable*, consideration in money, or, a rent of a pepper-corn, &c. being *money's worth*, as distinguished from *friendship*, &c.

Sometimes a deed intended to operate in a given mode, may be defective as a conveyance of that description, but may operate, by construction of law, in some other mode, as a covenant to stand seised, or as a grant at the common law, &c.

As often as this circumstance occurs, the consideration of marriage, blood, &c. on which alone an assurance by covenant to stand seised can be founded, should be shown; and if it do not appear on the face of the deed, it should be stated as a fact, that consanguinity, or the motive of marriage, existed between the parties.

By the observation that it is on marriage, &c. alone, that a *covenant to stand seised* can be grounded, it must be only understood that such consideration is essential to its operation in this mode; not that the existence of another consideration, in addition to marriage, &c. will exclude this operation. From a variety of cases, it may be collected that a deed may operate as a covenant to stand seised, although it be founded partly on marriage, &c. and partly on a pecuniary consideration.

And an instrument intended as a covenant to stand seised, may operate, under proper \*circumstances, as a grant; or [\*72] being inrolled as a *bargain and sale* of an use.

In this part of the deed it is also usual to acknowledge the receipt of the consideration-money. Such clause should be noticed in the abstract, very shortly, except so far as it may show the due application of the money; and when the nature of the transaction does, under such circumstances as have been suggested, call for such specification, then the clause should be stated fully.

In *ancient deeds* the consideration is necessarily presumed to have been duly paid; but in reference to modern deeds, *courts of equity*,

which, for the most part, have peculiar jurisdiction over matters of this sort, through the medium of trusts, require the purchaser to look to the receipt usually indorsed on the deed, as evidence of the payment of the consideration ; and not to the receipt, generally contained, as a mere form, in the body of the deed itself.

The want of a receipt by indorsement, or in a separate instrument, is *implied notice* that the purchase-money has not been paid, and raises a question of equitable lien in favour of the seller for his purchase-money, or so much thereof as does not appear to have been paid.

Such presumption, it should seem, is admissible only in deeds of modern date ; for instance within the last twenty years ; and in practice there seems to be a difference arising from the form of the deed.

[\*73] \*When a deed is expressed to be made in consideration of a sum then paid, the receipt is indorsed on the deed ; but if it appear by the recitals, as is oftentimes the case, on a re-conveyance by mortgagees, or their representatives, and sometimes even on sales to purchasers, that the purchase money has been paid, and the deed is founded on that consideration, the substantive recital of a fact which previously existed, is, as between the parties, considered to be conclusive on the point, and no receipt is expected to be found as an indorsement on the deed ; and of consequence the want of such receipt does not appear to be material.

In a case of this nature, the recital of the payment of the consideration should be given in abstracting the deed.

Whether a lien exists *by reason that part of the purchase-money remains unpaid*, must depend on circumstances.

*Prima facie* there is a lien ; and in order to show that the lien is excluded, there must be evidence to prove that the vendor relied on some other security, and had given up his right of lien.

Whenever part of the purchase-money remains unpaid, and the vendor agrees to take a bond or note, or any other like security for the same, a few words should be added in the purchase deed when prepared, to rebut the presumption of a lien.

Any form of words will answer this purpose. It regularly falls into the order of being part of the clause, acknowledging [\*74] the receipt, and may \*be to this effect, *The receipt or satisfaction of which said sum of one hundred pounds, the said A doth hereby acknowledge ; and of and from the same, and every part thereof ; and of and from all equitable or other lien, by reason that part of the said purchase-money remains unpaid, [or is secured only, and not paid,] doth acquit, release, and for ever discharge the said purchaser, his heirs, &c.*

Whenever there is in this clause of the deed any expression which, on the one hand, shows that there is a lien for the purchase-money, or, on the other hand, negatives such lien, that clause should be inserted in the abstract.

2dly, *The name of the grantor, &c.*

It should appear in the abstract who is or are named as the grantor or grantors ; and when they are trustees, at whose request, &c. they made the grant ; and if any particular mode of execution or attestation was prescribed, to express such request, &c. the clause which expresses this mode of execution, or attestation, should be stated.

The rule however that *non quod dictum est, sed quod factum est, respicitur*, is applicable ; and it is material to show, by the *memorandum of attestation*, that these requisites were actually and duly observed.

Also, as often as a deed is made with reference to, and in exercise of, a *power*, the words of reference to the power should be stated, together with the circumstances of the mode of execution and attestation ; but the preceding \*observation is [\*75] equally, indeed more, relevant to this clause.

When there are several *distinct clauses of grant*, it is convenient and eligible to give them in *distinct clauses*, to render them more immediately obvious.

It sometimes happens that an abstract is so negligently prepared, and written in so close and small a hand, that it requires infinite care, and a great sacrifice of the eyes, to select and arrange, or even to collect the operation of the deed, as to the different granting parties ; and the mode of abstracting is sometimes so obscure, that the precise operation of the deed is rendered very confused. Nothing can be conceived more distressing to the conveyancer, or, in the result, more injurious to the client, than an abstract so prepared. Such an abstract never can have the same degree of attention, revision, and frequent consideration, as one written properly and legibly.

In this part of the abstract, a common error, unless such be the language of the deed, should be avoided. It is that of stating that it is witnessed that *A B*, in consideration of, &c. then introducing the clause of grant, namely, the said *A* did, &c.

This is a grammatical error, and it corrupts the sense. There are two antecedents applied to the same verb ; each antecedent expressing the same thing ; and one of them being incompatible with the rules of grammar.

\*As often as it occurs, as it frequently does, that the [\*76] name of a grantor is omitted, so that in point of fact there is no antecedent to the verbs, which express the grant, the abstract should be a faithful transcript from the deed ; and the fact of the omission of the grantor's name, should be noticed in the margin. It is the province of the conveyancer to judge whether such omission be material ; and also his duty, though his attention be not called to the fact, to notice that the antecedent is omitted.

In several instances, and in particular in 2 Ventris, 141, the courts of law have supplied, in construction, the omission of the name of the grantor ; and it may be safely concluded, that the courts will follow this precedent, as often as the context of the

deed renders it necessary to a sound and genuine construction of the several parts of the instrument, that the name should be supplied : but many cases may be supposed, of compound or complex deeds, in which it would be *uncertain* whose name was intended ; and in such cases, the court would not feel themselves at liberty to render that *certain* by construction, which was, in point of intention, and of expression, left in doubt and *uncertainty*.

When a deed is made between two parties, and in all its parts imports to be a grant from one to the other, the court can seldom, if ever, be left in doubt respecting the intention, or have any difficulty in supplying the omission.

3dly, *Of the operative words of grant.*

[\*77] \*These words should be given fully ; in short, all the words of grant should be introduced, even though some of them may appear redundant, and though of necessity all of them cannot be operative.

And when there are several clauses of grant, the words of each clause should be furnished, and there is a neat, correct and technical mode of framing the abstract, so as to keep each distinct clause, as a distinct clause in the abstract.

4thly, *Of the name of the grantee.*

The grantee or grantees should, as a transcript from the deed, be mentioned in this part of the abstract ; and the words of limitation which are to be found in this clause of the deed should be added, as to *A B, his heirs and assigns* ; or to *A B, his executors, administrators, and assigns* ; or to *A B, and C D, their heirs and assigns* ; or to *A B, and C D, and the heirs of A B* ; for as this is a material part of the deed, and this part of the instrument may influence the construction of other parts of the assurance, it ought to be given with fidelity.

In various instances, this part of the deed may be operative, and the *habendum* rejected as *repugnant* : and an opportunity ought to be afforded to the conveyancer of judging in what manner, and to what extent, decided cases are to be applied to the different operative parts of the deed.

In *Spyve v. Topham*, 3 East, 115, there were a lease and [\*78] release ; the release was made \*between one Thickeston of the first part, Topham of the second part, and Bass (a trustee of Topham,) of the third part. And in consideration of 700*l.* to Thickeston, paid by Topham, it was witnessed that Thickeston confirmed to *Topham* and his heirs, to hold to *Bass*, and his heirs, to uses which gave Topham a power of appointment, while the lease for a year was from Thickeston to *Bass*.

An objection was made to the title, under a supposition, that Topham was the releasee, or grantee in the release ; and that the estate for a year, the only foundation for a release, was in Bass, and not in Topham ; so that Topham had not any estate capable of enlargement ; and it was urged, that as Bass was named in the *habendum* only, and not in the granting clause of the release, he

could not be deemed the releases; but on the authority of 1 Inst. 7. a. Shepp. Touch. 75, *Butler v. Elton*, Carey's Reports in Chancery, 122, *Earles v. Lambert*, Allyn, 41; in opposition to *B v. Coulter*, Cro. Eliz. 903, the court rejected the grant or release to Topham, and treated Bass, though named in the *habendum*, and not in the premises, or clause of grant, as the releasee, the judges observing, that the cases cited were perfectly satisfactory in authorizing them to put a construction on the deed, in support of it, which, from the reason and good sense of the thing, they should probably have done without such authorities.

\*Cases of this sort are founded on the rule, that a grant [\*79] will be good, although the grantee be named as such in the *habendum* only, and not in the granting clause.

Further distinctions on this point will be noticed under that division which treats of the *habendum*.

When a *personal annuity in fee*, as distinguished from a rent-charge as such, is originally created, the deed creating the annuity should not only state the words of limitation to the grantee; it should also state the words of lien or obligation on the part of the grantor and his *heirs*; for instance, *A B*, for himself, and his *heirs*, did grant, &c. to *C D*, and his *heirs*; for an annuity in fee, as a personal charge, cannot exist, unless the *heirs* are bound to the payment of it.—Preston on Conveyancing, vol. 2, p. 469.

### *Of the Lease for a Year.*

In the abstract of an assurance by lease and release, it is usual to introduce the abstract by these words, first giving the dates in the margin, "*By indentures of lease and release.*"

Sometimes there is a short reference to the lease for a year in the premises; thus, in the *actual possession*, &c. merely to show that the lease for a year is recited. This recital of a lease for a year is particularly important, when the lease for a year has been lost, or cannot be found.

\*It is also important in deeds of conveyance of *Irish* [\*80] *estates*; since, by the laws of Ireland, the recitals are conclusive evidence of the lease for a year; or rather, no lease for a year is made, and the recital of a supposed lease for a year, supplies its place.

In conveyances of *Jamaica estates*, no lease for a year is used by the gentlemen most conversant with the laws of the island.

Some gentlemen have doubted whether the recital of a lease for a year, in a recovery deed, by lease and release, can be used against *issue in tail*, or persons in *remainder or reversion*. The gist of the objection is, that *issue*, *remainder-men*, &c. are not bound by *estoppel*; but there is strong ground to contend that the recital is not used as an *estoppel*, but as evidence; that the recital is evidence against the tenant in tail; and that whatever is evidence against the tenant in tail himself, is evidence against all persons connected

with him in privity of estate. It is clear that a copy of the lease and release, or of the lease for a year, would be evidence of the original against the issue and remainder-men ; and *à fortiori*, a recital by a tenant in tail of an act, as being his deed, must be the best evidence, next after the original, of the existence of the lease for a year.

The late case of *Holmes v. Ailsbie*, 1 Mad. Rep. 551, has not obviated the alleged difficulty. That case merely decides, that under the act of 14 Geo. II. c. 20, sec. 5, the recovery [\*81] \*shall be valid, notwithstanding the loss of the lease for a year, as part of the assurance by lease and release. That statute does not apply except there has been a lapse of twenty years since the recovery was suffered.

### *Of the Parcels.*

It has already been noticed, that at the head of the abstract there should be an intimation as to the parcels to which the attention is to be directed.

Sometimes, particularly when the description of the parcels is short, and uniformly the same in different deeds, or without any material variation, there is not any more eligible mode of describing the parcels, than by giving them at length, at the head of the abstract, in the terms in which they are to be found in the last purchase deed.

But this is not convenient, when the parcels run into great length ; and it is inadmissible when the parcels are described in a different manner in different deeds.

The more general plan is to give the parcels at large, in abstracting the first deed, and in the terms of description which occur in that deed ; and in the subsequent deeds to notice each variation, if any, which has taken place in the names, or other material parts of the description.

[\*82] And as often as the abstract relates to a single \*farm, which was formerly parcel of a manor ; or to a close, which was parcel of a farm, and the farm or close passed inclusively, under the general denomination, the abstract should state the parcels in these or the like terms :

All that the manor, &c. of which the farm, &c. or all that farm of which the close, &c. mentioned in the subsequent deeds, is parcel.

Another mode of arriving at the end proposed is to state in the head of the abstract, that the farm, &c. or close, &c. was formerly parcel of the manor of, &c. or farm of, &c.

But if the farm or close be particularly described in the deed in question, then the particular description should be given ; and if the farm or close in question, &c. passed under general words, or there be any error in the particular description ; in each instance,



the general words embracing all other manors, &c. or all other manors, &c. comprised in certain deeds, &c. should be added.

Inaccuracies and errors in the names and quantities, and even omissions of parcels are so common, that it is prudent in most instances, in preparing deeds, to insert general words adapted to the case, so as to supply any such error or omission; and whenever the deed warrants such insertion, it is proper to abstract these general words; or at least to give an intimation, that there are general words in the deed, thus: *And all other manors, &c. which were purchased by* from, &c.

\*In subsequent deeds, it will be sufficient to refer to the premises generally, in these or the like terms: *All the parcels comprised in the abstracted indentures, dated the* [\*83] *days of* or, *all that the said manor of*. The said farm, called; the said close, called

But when any distinction is necessary, as is the case when various parcels of land are included, and it is material to distinguish some of them from others of them; then the more prominent feature of distinction is the *name*; and the reference should be to the name. But sometimes the quantity, the occupier, the local situation, or the like, is the distinguishing circumstance, and then the reference should be to that circumstance, as the said close, containing 10 acres, or the like.

To the general rule, that, in the abstract of the subsequent deeds after the first, the parcels may be referred to generally, or by a slight notice of them, the following exceptions should be made, and others of the like nature will fall under the same consideration.

1st, If the lands in question are a farm parcel of a manor, or a close parcel of a farm, and the manor or farm is the subject of description in the former deeds, then the description of the farm or close should be given at length, from the first deed in which the farm is separated from the manor, or the close from the farm, and \*is fully described, instead of passing under a general denomination. [ \*84 ]

2dly, As often as there is any material variation in the description, either as to the name, the quantity, or the like, which can, by any construction, vary the effect of the deed, or elucidate the identity of the parcels, such variation should be shown. *As the said farm, &c. therein described as all that farm called* or heretofore called and now called; or, as containing acres; or, as in the parishes of &c. or, as in the occupation of or, as having descended from to; or, as having been devised by to

The former circumstances are more particularly important when they connect the modern description with the ancient description; and the latter circumstances are material only to show that the title has been acted on according to the former statement of the evidence, or these circumstances fill up a chasm in the evidence of

the title ; or afford notice of some circumstance which it may be proper to investigate.

It is too common to change the description of the parcels, by adapting them to the present state of the closes ; or, to substitute for a general or comprehensive description, a more minute, detailed, and particular description.

There are various modes of accomplishing this object, when advisable.

[\*85] \*Some gentlemen use the description as found in the ancient deeds, and afterwards add a new description, introduced by these or the like words: *Which said messuage, farm, lands, and hereditaments, are now better known by the description of, &c.*

Whenever this mode is adopted, it is highly expedient that a few words should be added, to embrace within the scope of the grant, all the closes, &c. which are known by the modern description, since, without this addition, the old description is the only substantial part of the deed, and no error in that description is cured, or inaccuracy supplied, by the superadded description.

The words of additional grant may be of this or the like import : *And all other the messuages, &c. which are hereinbefore mentioned, enumerated, or described by their present certainties or descriptions.*

Some gentlemen adopt a more eligible plan ; they, in the first instance, describe the farms, closes, &c. by their modern description, and then add a reference, by way of showing their identity, and their connection with the ancient description.

In this mode the lands known by the new description are the subject of the grant ; and the sole use of the reference to the ancient description, is to connect the deed which is preparing, with the more ancient evidences of the title.

[\*86] \*It is always, however, a circumstance to be investigated, whether this application of the ancient description to the parcels which are purchased, is warranted by the fact.

On many occasions this averment is added, without sufficient evidence to justify it ; and the title really depends on deeds or documents of title, of which no abstract is given.

Unless the facts imperiously call for an alteration in the description of the parcels, the more secure, and, for that reason, the more correct mode is to adhere strictly and closely, as far as circumstances will admit, to the description in the former deeds.

But in some cases, the description must necessarily be varied, and new denominations introduced ; as when a particular farm is purchased, and it used to pass under the name, and as parcel of, the manor, &c.

With the exceptions which cases of this sort render necessary, the ancient description of the parcels should be retained, and as when *allotments, exchanges, &c.* are made under *inclosure acts*, the lands received upon such allotment or exchange becomes subject to the title which attached and belonged to the lands, in respect of

which, such allotments or exchanges were made ; and the existence of such allotments or exchanges ought to be stated, in the order of the dates, and at the period when they took place.

From that period it is to be shown, that the \*deeds, &c. [\*87] are in terms comprehending these allotments.

The omission of parcels of this description most frequently occurs in deeds of assignment of attendant terms, special letters of administration, and the like. And in modern practice a few words are added in these and the like species of instruments, for the purpose of bringing within the operation of the deed or other instrument, the parcels of this description ; of course, when relevant, these descriptive terms ought to be stated in the abstract.

It is to *allotments* and *exchanges* only under *acts* of parliament for inclosure, &c. that these observations are applicable.

The effect of one of these acts is to communicate to the lands received on allotment or exchange, the precise title which affected the property, in lieu of which the allotment or exchange was made.

In exchanges between individuals by way of conveyance, or even by an enabling act of parliament obtained for the sole purpose of exchange, no such identity of title is preserved or communicated. The title to the lands received in exchange, will depend on the deeds, &c. which concerned those lands prior to the exchange ; and on account of the warranty annexed to such exchanges, whether made by private deeds between individuals, or through the medium of an act of parliament, the abstract ought to contain the history of the title, as well \*to the lands given, [\*88] as to the lands received, in exchange ; since there may be an eviction for want of a good title to the lands given in exchange, or the lands received in exchange.

A title of a still more complex nature, and of greater difficulty, exists, when a person has many farms, held under different titles, and, on an inclosure act, he receives an allotment in lieu of all these lands, or of common rights, affecting all these lands ; or he purchases various allotments made to cottagers or other persons in small quantities, in respect of different tenements.

Under these and the like circumstances, in order to show a marketable title, there ought, in strictness, to be an abstract of the deeds, &c. containing the evidence applicable to each tenement, for which an allotment was made.

Supposing the allotment to be entire for many tenements, and the title to one of these tenements to be defective, the title to a part at least of the allotment will be equally defective ; and the inconvenience and incalculable mischief are, that no person can ascertain the particular part of the allotment which would be recovered on eviction by reason of this defect.

In some cases, titles, involving these circumstances, would be attended with more expense to put them in a marketable state, than the actual value of all the lands.

In one instance it was reasonably computed, that there must

have been two hundred different abstracts, to show the real state of the title.

[\*89] \*In another instance, a vendor abated twenty thousand out of sixty thousand pounds, rather than have the contract rescinded, on account of an objection insisting on this defect, and that since the lands were not ascertainable, the court could not decree performance with an abatement.

Transactions connected with the redemption of the *land-tax*, sometimes also involve the title, with reference to the parcels, in great perplexity.

When the *land tax* is purchased by a particular tenant, and some of the lands are settled to one class of uses, and others to a different class of uses ; and there is one entire contract for the redemption of the land tax ; for example, when some of the lands are held in fee, and others for a particular estate, and there is one contract only for the purchase of the land tax of both estates ; a title derived under a sale, made under the powers given by the land tax acts, will be defective.

It is obvious, that cases falling within these observations will require particular attention concerning the parcels.

In regard to inclosure acts, it would be convenient that general commissioners should be appointed, enabling them, at the instance of the parties interested, to make allotments distinctly for lands held under *distinct titles*, or *distinct tenures*, so as to correct any errors or omissions of the commissioners acting under local acts.

[\*90] \*And on redeeming the land tax, each contract should be for such lands only as are subject to the same uses ; and there should be a power to commissioners, to correct mistakes made in this particular.

It has happened more than once, that an allotment under inclosure acts has been entire, and made in respect of some lands held for life ; others held in tail, and others held in fee ; and in the present state of the law, and in the absence of decisions, a title more perplexed, in respect of the parcels, cannot be easily conceived.

Whenever any doubt exists whether particular lands were the subject of deeds which granted lands in general terms ; or by a description now grown obsolete, the relevancy of the former deeds ought, in a complete abstract, to be shown by means of cotemporary documents, as leases, assessments to the land tax, poor rates, &c. maps, stewards accounts, and the like.

That the present assessment to the land tax, or poor rates, as it applies to the lands actually purchased, can be traced back through the whole period of the abstract, without any material variation, will, in general, relieve the title from all doubt on the point of *identity*.

The advice to be given is, to compare the assessments at the distance of each period of ten years, unless grounds appear for abridging the period. This is a short mode of investigating the identity.

\*In stating the duty of the conveyancer, it will be proper [\*91] to advert to those errors in the description of the parcels, which are, and those which are not, deemed material.

Another reason for disclosing a variation in the parcels, is, to enable the purchaser, or his counsel, to form an opinion, whether such variation can affect the validity of the title.

3dly, As often as the abstract is delivered with a view to a sale, or that deeds may be prepared from the abstract, the parcels should be stated at full length, from such of the deeds as are proper to be recited; especially the last purchase deed; and also, in the mortgage deed, or trust deed, if any conveyance is to be taken from the mortgagee or trustee; since mortgagees and trustees, frequently, with more caution than good reason, refuse to join in conveying by any other description than that which was introduced into the conveyance under which their title is derived.—See Sheppard's Precedent of Precedents, 160.

4thly, The description is sometimes given by terms of reference.

In these instances, the terms of reference should be stated fully, since they are of the essence of the description; and a mistake in them would, in many, indeed most cases, be fatal.

A mistake of this sort frequently occurs in the assignments of terms, made with reference to the deed, by which the lands were previously assigned to the present trustee, or the testator, \*or intestate; and, on that point, the more material and [\*92] relevant observations have already been offered.

And when the mistake destroys the essence of the description, so that there is a want of the certainty required by law, the error will no doubt vitiate the deed: but if a certainty exist, notwithstanding a mistake, as it does in the instance already stated of a correct recital, and a mistake in the reference to this recital, the deed would be supported, and have its operation.

Also when the grant is of a reversion or remainder, and the substance of the grant is, "all that the reversion or remainder, &c. expectant on, &c." these words should be set out at full length, since any error in the essential part of the description, would destroy the effect of the grant; for example, if the reversion or remainder was described as expectant on the death of *A*, when in truth it was expectant on the death of *B*, then, as in point of fact, there was not any such reversion or remainder, the words of grant cannot have any application, and will for that reason fail of effect.

The mistake, however, of calling a remainder by the name of a reversion, or a reversion by the name of a remainder, is not material; for a reversion may pass by the name of a remainder, or *converso*; as well as by its proper denomination.

[\*93] \*Of general words : exception, and the clauses of reversion, estate, deeds.

WHEN the terms of description are of a general nature, as, 'all that farm called A,' so that a question may arise whether it extends to certain lands reputed to be parcel of the farm ; and a reliance is placed on the clause of general words, granting "all messuages, &c. or all out-houses, closes, &c. parcel, &c. or reputed parcel ; or held, used, occupied, &c." this clause should be abstracted fully, as it may tend to remove doubts which otherwise might exist.

This is more particularly the case when a farm is enlarged by the addition of certain closes, which had formerly passed by certain names, and a distinct description ; and this description is sunk in the general denomination of the farm, &c. ; so that those particular lands cannot pass, otherwise than under the general denomination of the farm, or the general words, which embrace all closes, lands, &c. held with the farm, or reputed parcel, &c. thereof.

And sometimes it may be even necessary to add an abstract of old leases, or the like documents, to show that there has been an unity of occupation ; and to give evidence, by affidavits, to support the fact, that the closes have been deemed parcel of the farm.

[\*94] Some observations have already been offered \*on the subject of general words, containing the clause commonly called the *sweeping clause*.

This clause should be added as often as any aid can be derived from it ; so as to remove a difficulty respecting the parcels, as that difficulty may arise, either from an error in the description, or from a want of sufficient identity ; or from any other cause which raises a question of defect, which may be supplied by such general words.

But in a well prepared abstract, no more parcels should be introduced than those which are materially relevant to the title to be considered ; and if one abstract be made for the use of divers purchasers, the parcels which are purchased by such purchasers respectively, or by the purchaser for whose use the particular abstract is delivered, should be pointed out by marginal observation, or by some other notice ; and this observation is equally applicable to each deed, &c.

In abstracting clauses which contain general words, the attention should not be drawn to more parishes, townships, &c. or other terms in the deeds, than are relevant to the parcels, as to which the title is under consideration ; for example, when the abstract concerns lands in Tunstall only, the form should be, "*And all manors, &c. messuages, farms, lands and hereditaments, in several parishes and places therein mentioned, and among them Tunstall.*"

\*It would be a great accommodation to the conveyancer, [\*95] and promote the despatch of business, that this observation should receive attention, and be introduced into general practice; and the practice should be extended to all similar cases to which the observation can be applied. Nothing displays more attention, or more skill on the part of the solicitor.

And in this place it may be properly noticed, that in preparing deeds of extensive property, with general words, either naming the several *occupiers* or *tenants*, or the *townships* or *parishes* in which the lands are situate, it is usual, with gentlemen whose experience has taught them the value and utility of such arrangement, to name the occupiers, the tenants, the townships, the parishes, &c. &c. in *alphabetical order*. And the adoption of this practice cannot be too strongly recommended.

The exception also, if any, in the deed, out of the parcels, should be noticed, as far as it is relevant to the parcels to which the abstract relates.

The clause of the *reversion*, unless it contains special matter, as the apportionment of rent, or the like, ought to be noticed only by a short reference, in these or the like terms, '*and the reversion,*' &c.

The like observation is equally applicable to the clause of '*all the estate,*' with the exception, however, that if from any error in the *habendum*, the estate is not well limited by [\*96] that clause, and consequently the clause of all the estate may be the efficient and operative clause of limitation, the language of this clause should be fully detailed. See *Jermyn v. Orchard*, Show. Parl. Cases, p. 199.

But although the clause of '*all the estate*' import to grant all the time or ownership which is in the grantor, yet it is now, in opposition to the current of the earlier authorities, decided, that this clause does not exclude the power of the *habendum* to give a partial interest by way of *underlease*: for the effect of the grant and *habendum*, collectively taken, are to demise the land and all the estate, for a term of years, so that there is not any repugnancy or inconsistency. See *Earl of Derby v. Taylor*, 1 East's Reports, 502. The point decided in this case, differs from the long and much controverted point, raised in *Jermyn v. Orchard*.

In the latter case the *habendum* was *void*, and the court would not suffer a void *habendum* to defeat a grant which was complete. In that case a term was granted. *Habendum* from and after the death of *Thomas Nicholas*. This *habendum*, for a reason purely technical, and which merits reconsideration, could not operate; and as there was a grant of the *recited lease*, the court decided that the *habendum* might be rejected, and the granting words retained, *Ut res majis valeat, quam pereat*.

\*The clause granting all deeds, &c. should also be no- [\*97] ticed only by a short reference in this or the like form, *And all deeds, &c.*

*Of the Habendum.*

WHEN the habendum is correctly prepared, it has words of reference to the parcels, and names the grantee, and limits the estate.

Supposing the habendum to be correct, the common practice, in reference to the parcels, is to give the effect of the habendum thus, *To hold the same unto, &c.* But as often as the habendum is inartificially penned, by omitting some of the parcels in the enumeration, or reference to them, this variation should be noticed.

Sometimes also there are *different clauses of habendum.*

In these and the like instances the parcels enumerated in the different clauses should be specified, so as to show that the terms of reference are correct, and what are the operations of the different clauses.

Sometimes also one person is named as the grantee in the premises, and another in the habendum. In general the grant will operate, and the habendum be rejected.

But under circumstances, as already noticed, the habendum may be retained, and the name in the grant rejected ; as where a lease was to *A*, and the release to *B* ; habendum to *A* ; under these and other circumstances, which manifested an intention that *A* [\*98] should be the grantee, the \*grant in the premises was held inoperative, and the habendum was allowed to be effectual.

So when a feoffment is made, the livery would probably determine the operation ; for example, the charter has a grant to *A*, habendum to *B* : If livery be made to *A*, he would be deemed the grantee. On the other hand, livery to *B* would determine the courts to decide that the deed and livery were an effectual conveyance to *B*.

In the case of *Spyve v. Topham*, 3 East, 115, the difficulty was to reject the grant, and to retain the habendum. Had the grant been correct, and the habendum repugnant, no difficulty would have existed ; for it is established by many authorities, that when there are two clauses in a deed, and one of them is repugnant, the latter shall be rejected : also that a grant may be good without an habendum, so that upon a substantive case of a grant to *A* and his heirs, habendum to *B* and his heirs, independent of other circumstances, the grant would be retained, and the habendum rejected. In a case which occurred in practice the grant was to *K* and *H* and their heirs, habendum to *Cross* and his heirs. So that on the general rule the habendum, and not the grant, was to be rejected ; the livery also was made to *K* and *H*, and this circumstance showed they were, in point of intention, to be the grantees : for livery, it is to be observed, is the essential part of a feoffment. Had the livery been made to *Cross*, instead of *K* and *H*, that circumstance would have [\*99] \*brought the case within the reason of *Spyve v. Topham*, and have determined the construction of the deed, by leading to the conclusion, that it amounted to a grant to *Cross* and his heirs. As in effect the grant was to *K* and *H* and their heirs, to uses, the



habendum to Cross was rejected : thus the uses arose from the seisin which passed to *K* and *H*.

In this part also of the abstract the name of the grantee or grantees should be added ; and when there are any words of modification, *severing the tenancy*, these words should be faithfully abstracted, or rather transcribed.

The *words of limitation* also should be faithfully given, and rather fully than concisely.

And as a deed, operating under the rules of the common law, may be void, because it limits an *estate of freehold, to commence in futuro*, the words which suspend the limitation or operation of the grant, *quo ad* the estate, by limiting the same to commence at a future time, should be added.

Let it be remembered, that an use or a trust, or a term of years, or a rent, on its creation *de novo*, may be limited to commence in *futuro*. [Essay on Estates, ch. *Freehold*.]

In a note by Mr. *Powell* to his edition of *Wood's Conveyancing*, the law, as it regards the learning on the *habendum*, is given with great accuracy, and in a very neat and compressed form, and is deserving of particular attention.

\*Connected with this subject, and belonging to it, is the [\*100] important learning of remainders, of contingent remainders, and the various consequences to which contingent remainders are subject.

Remainders are in abstracts generally introduced by that word, unless the remainders are limited by *words of contingency*.

The abstract should always state the words of contingency by which contingent remainders are limited.

There is scarcely any learning connected with the forms of deeds which requires more attention than that which concerns the *description of the parcels*, the rules regarding the exception of parcels, and the *repugnancy* between the grant and the habendum.

In detailing the duties of the conveyancer an attempt will be made to collect the rules of law applicable to these several heads.

### *Of the Reddendum.*

THIS clause should be stated very briefly, except in two cases, viz.

1st, Where the rent is reserved in some particular manner, and a question may be raised on the validity of the reservation.

2dly, Where the rent is the subject of the title to be considered, and the deed is abstracted for the purpose of showing the creation of the rent.

\*In these and the like cases the abstract should be full, [\*101] so as to give all the particulars which may be material.

With these exceptions it is sufficient to show the quantum of rent, and the stated times of payment ; and also, if such be the fact, that

the rent is to be clear of deductions for *land tax*, or of all deductions generally.

*Of the Declaration of Uses.*

As often as a conveyance is made to a man and his heirs, to the use of him and his heirs, so that, in effect, he takes by the rules of the common law, the declaration of use has no other effect than to exclude a resulting use; and in abstracts, the limitation of the estate, and the expression of the use, are, under these circumstances, consolidated into this form, To hold the same, &c. unto and to the use of the said *A B* and his heirs.

This mode of abstract is also observed in application to freeholds for lives, when the expression of the use is a mere echo of the limitation of the estate; for in assignments of estates for lives to a purchaser, to trustees who are to retain the estate, the grant, or rather the assignment, is generally made to and to the use of the grantees during the lives.

But observe, that when the grant or assignment is to and to the use of the grantee, no further uses to be executed by the [\*102] statute are admissible. Of course, when the uses are to be declared to govern the legal estate, there should be a simple grant to the grantee, his heirs, &c. to the intended uses; and the abstract of a deed, so penned, should show the uses distinctly from the legal seisin.

*A*, tenant for life, made a grant, with livery, to *A*, and to his heirs, habendum to *A*, and his heirs, to the use of *A*, and his heirs, for the life of *A*. *Jenkins v. Young*, Cro. Cha. 230.

On these facts a question arose whether there was a forfeiture. It was attempted to support the conveyance as a grant for life only, and as on that account exempt from the right by forfeiture. The ground taken was, that the grant and the use were parts of the same limitation, so that, in effect, there was a grant only for the life of *A*; but it was decided, that the grant was distinct from the use, and that the grant with livery passed the fee; and that the forfeiture was not saved by confining the limitation of the use, which was a distinct clause, to the period of the life of *A*.

This mischief would have been avoided had the habendum been to and to the use of the grantee and his heirs for the life of *A*; for in this mode the use would have formed part of the limitation of the legal estate.

A like error sometimes occurs in levying a fine *sur concesserunt* in fee, or *sur comuzance de droit come ceo*, &c. when the comuzor has merely an estate of freehold. It is in vain that the deed [\*103] of uses treats the comuzor as tenant for life; for though to some purposes, the fine and deed of uses are parts of the same assurance, there is not any reason to expect that the rule would be applied to a case of this description.

And yet where a grant was made to a man and his heirs, habendum

dum to him and his heirs, to the use of the heirs of his body, the court held the habendum and the use to be part of the same limitation.

As often as the declaration of use is to operate distinctly, through the medium of the statute of uses, it governs the legal title, and the uses should be given fully, at least so far that the precise state of the title may be collected from them.

As titles more frequently turn on limitations of use than on any other part of the deed, it will be right to consider this part of the abstract with particular attention, and to give some directions, by means of which abstracts may be prepared with accuracy.

These observations are equally applicable also to limitations of use in wills, and for that reason should be read as equally referrible to them.

In every limitation of use four circumstances are to be considered; 1st, The time at which, and the circumstances under which, the use is to arise.

2dly, The person in whose favour the use is limited.

3dly, The duration of the estate, as expressed in the limitation.

\*4thly, The words of modification, which regulate the [\*104] order, or manner of the enjoyment.

The time at which an use or estate is to commence, is for the most part expressed in the words by which the limitation is introduced.

This is more particularly the case, in introducing limitations by way of remainder, and on the creation of future springing, or shifting uses.

In deeds to operate by the rules of the common law, a grant of an estate to commence in future, is void, because it places the freehold in abeyance.

But in wills, under the learning of executory devises, and in conveyances to uses, under the learning of springing uses, the estate may commence from a future day, or from a given event; so as such event fall within the rule prescribed against perpetuities.

The language which expresses this future use or estate, and also the language which limits a contingent remainder, should be fully and faithfully abstracted; and the more special are the words by which the limitation is introduced, the more full and correct should be the statement of these words. Clauses which are expressed in a special manner, or which have a more than ordinary portion of language to denote the intention, require to be particularly detailed. The construction must be made on the whole clause, and the intention collected from, and consequently the rules of law be applied to, every part of the clause.

\*Future uses are denominated from the circumstance, that [\*105] they give interests to arise at a future time, or on an event; and when they are to arise on an event, or contingency, they fall

under the denomination of contingent uses, and in some cases contingent remainders.

But sometimes there may be a future use, which is neither a remainder nor contingency, as in a conveyance to *A* and his heirs, to the use of *B*, and his heirs, from and after the 29th day of next September. This use is not contingent, nor is it a remainder : it is a future or springing use. No use will arise till the limited period ; and in the mean time the use of the fee will result, so that the original settler or grantor has a fee determinable when this future use shall give a vested estate.

Such future use, while it remains in its executory state, is devisable, or may be released, or may be bound by estoppel, or may be extinguished, or may be the subject of a contract, or agreement in equity : but an interest, under a future use, while it remains executory, cannot be transferred by a common law conveyance.

Besides, when the first use is future, all the other uses, depending on the same, are, except in very particular cases, arising from special regulations, also future.

Hence the importance of stating all circumstances which may afford any information respecting the nature of the use, and the contingencies on which it depends.

[\*106] \*Also, whether a remainder is to be deemed vested or contingent, must depend on the language or terms in which that limitation is penned, or the object in whose favour the use is expressed.

An use may be contingent from various causes :

1st, Because it is limited expressly on an event which may or may not happen, as the death of *A*, in the life-time of *B* ; or the payment of a sum before a given day ; or the payment of a sum by *B* ; since it is uncertain whether he ever will pay. And here note that if the payment is to be by *B* or his heirs, there must be a limited time, or the use depending on this contingency will be too remote, since the payment may not be made within the period prescribed by the rule against perpetuities.

So an interest to commence from the return of *C* from Rome, is contingent, for he never may return.

In short, an interest is contingent, as often as in terms, or in construction of law, it is limited to commence from an event which may or may not happen. Also an interest may be contingent, because it is limited to commence at a time (as the death of *B*), which, though it necessarily must happen, will not certainly happen during the continuance of a particular estate, for the life of some other person than *B*.

Thus, if *A* be tenant for his own life, and a remainder is [\*107] limited to *C*, from and after the \*death of *B*, this remainder is contingent ; because *A* may die in the life-time of *B* ; in other words, the particular estate may determine before the remainder is capable of vesting.

So if *A* be tenant for his life, and a remainder is limited to *C*

from and after the deaths of *A* and *B*, the remainder is, for the same reason, contingent, because *A* may die in the life-time of *B*, and the remainder of *C* cannot, consistently with the language of the gift, take effect, as a vested interest, until the death of *B*. In short, the remainder will be void if *A* should die in *B*'s life-time.

These conclusions arise from a rule of law, that a remainder must vest during the continuance of the particular estate, or *eo instante* that it determines, or the remainder will fail of effect.

These are contingencies, therefore, by implication of law, arising from the nature of the limitations, and their legal operation.

These gifts are not contingent in themselves. They are only contingent with reference to the law on remainders, that *B* must die in the life-time of *A*, to give effect to the remainder.

This shows the necessity of distinguishing accurately between a remainder and a springing or future use. For if lands be conveyed to *A* in fee, with a substantive independent use to *C*, after the death of *B*, this is a future but not a contingent use. It is future, because it is to wait for effect until the death of *B*; but it is not contingent, because *B* will certainly die; \*and [\*108] the future use will, in construction of law, certainly take effect on his death.

And there would not be any inaccuracy in treating this as a contingent use; since in point of law, it depends on the contingency that it shall not be released or destroyed before it can take effect; and all that is necessary is to distinguish it from contingent uses being remainders, as far as such contingent remainders are subject to be destroyed by the determination, tortious alienation, surrender, merger, or forfeiture of the particular estate.

But every interest, which is limited to commence, and is capable of commencing, on the regular determination of the prior particular estate, at whatever time the particular estate may determine, is, in point of law, a vested estate: and the universal criterion for distinguishing a contingent interest from a vested estate, is, that a contingent interest cannot take effect immediately, even though the former estate were determined; while a vested estate may take effect immediately, whenever the particular estate shall determine.

Hence it often happens that a limitation, expressed in words of contingency, is, in law, treated as a vested estate.

The obvious examples are, To the use of *A* for life, and if *A* shall die in the lifetime of *B*, to the use of *B* for his own life. In this instance the estate of *B* is vested. The reason of this particular case is, that no more is expressed \*than is im- [\*109] plied by law, since he could never take in the order of limitation, unless *A* should die in his life-time. The rule which governs this case is *expressio eorum quæ tacite insunt nihil operatur*. But if the limitation to *B* had been to him for years, or for the life of *C*, or in tail, the rule would not have been applicable; and of consequence, the remainder would have been contingent.

On a recent occasion a curious question calling for the application

of this rule arose. Lands were limited to *A* for life ; and if *A* should die in the life-time of *B*, his intended wife, to the use of the wife for life ; and after the death of the survivor of *A* and *B*, to the use of the heirs of the body of *B*, to be begotten by *A*. A gentleman of great eminence and experience considered *B* as simply tenant in tail, and her interest as *contingent*. He construed the several limitations as if an estate tail had been given by one entire clause. On the other hand, it was contended, that the several limitations were to be construed separately and distinctly, so that *B* had a vested estate of freehold, which connected itself with, and drew to itself, under the rule in *Shelley's case*, the benefit of the limitation to the heirs of the body of the wife, as a vested estate tail. No decision has been obtained on a case thus circumstanced.

Also, if an estate be limited to the use of *A*, and the heirs of his body, or is devised to *A* and his heirs, and if *A* shall die [\*110] without heirs \*of his body, or issue of his body, to *B*, though these words express a contingency, they do not suspend the vesting of the limitation in remainder. They merely designate the time at which the remainder is to commence in possession. The consequence is, that the remainder is vested, since it may take effect on the determination of the particular estate, at whatever time that estate shall determine. But if the limitation over had been introduced by these or the like words: If *A* shall die without issue in the life-time of *B* ; or if any other contingency had been expressed, unconnected with the actual determination of the prior estate, then the remainder would have been contingent.

In some instances a limitation over may cause a prior gift to vest the interest, while, without such limitation over, the gift would have given a contingent interest.

Thus, a gift to *A* and his heirs, at his age of twenty-one years, or when he shall attain that age, gives a contingent interest. [*Grant's case*, 10 Rep. 50. *Golds.* 107.]

But a limitation over, or substitution, in case *A* should die under twenty-one, would give to the former limitation the construction and consequent effect of passing a vested interest. [*Edwards v. Hammond*, 2 Show. 398. 3 Lev. 182. *Doe v. Nowell*, 1 Maule and Selwyn, 327. *Broomfield v. Crowder*, 1 New Rep. 313.]

In this place also, it is to be observed, that a more remote [\*111] remainder may be vested, although \*a more immediate remainder by way of particular estate is contingent, provided the estate of freehold on which it is made to depend, is limited by way of present estate, so as to confer a vested interest.

When a remainder in fee is limited on a contingency, then all subsequent limitations by way of alternate, or substituted, remainders, must necessarily be contingent.

So if one limitation is too remote, all other limitations by way of remainder must necessarily be too remote.

But in wills, or conveyances to uses, a subsequent clause may introduce a vested estate, to fill up the chasm or interval during

which there is to be any suspense or abeyance. Residuary clauses in wills frequently give a vested remainder, to remain in force, until defeated by the vesting of a contingent remainder in fee; and it is observable, that this remainder passes to the devisee, and in most instances, under general words, instead of descending to the heir.

This remainder is immediately expectant on the particular estate; and yet the contingent limitation operates as a remainder, and may be destroyed; at least, such is the opinion which obtains in practice, even while the residuary devisee has the like interest as the heir would have taken, if this reversionary interest had not been devised.

This is a peculiarity in law, introduced by \*the learning [\*112] of wills, and of uses; namely, of a particular estate, and a remainder in fee, and the remainder in fee liable to be divested by another estate, though a fee, to operate as a remainder. Another peculiarity is, the operation of the contingent interest, as a remainder, and not as a shifting use, or executory devise, and its liability to destruction as a contingent remainder.

Remainders also may be contingent, because they are limited to a person unborn, as to the first son of *A*, who has not any son; or because the person is not ascertained as the survivor of several persons; or the heirs, as purchasers, of a person who is in being.

In short, to simplify the idea of a contingent remainder, it is better to say generally, it is a remainder, to take effect on an event which may not happen; and to add, that a remainder may be contingent from either of two causes:

1st, Because it is to take effect on an event which is expressed.

2dly, Because it is to take effect on an event implied by law.

Under the first class may be ranked all remainders which are limited by words of contingency; as,

1st, To *A* for life; and if he should die under twenty-one, to *B*.

2dly, To *A* till he should return from Rome, and after his return to *B*.

\*By way of contrast to a former case, observe, that the [\*113] words "till he shall return from Rome," form the measure of the estate, and not, as in that instance, raise the question whether the first gift is or is not on a contingency. Thus two cases apparently similar, are, in reality, different. At the same time it is a notorious fact, that the case of *Hammond v. Edwards*, and the other decisions of that class, are considered as cases *sui generis*; as decisions, which proceeded from refinement, to support gifts, under circumstances of apparent hardship, rather than from established rules.

Under the second class may be ranked all estates which are limited;

1st, To a person not ascertained.

2dly, To a person not in being.

3dly, To those who have no present capacity, as a corporation during the vacancy of a mayor, &c. Or which may fail of effect,

because the particular estate may determine before the remainder can commence ; as,

1st, To *A* for life, and after the death of *B* to *C*.

2dly, To *A* for life, and after the death of *A* and *B* to *C*.

Or which are to take place only in case a fee, previously limited on a contingency, shall not vest.

These observations demonstrate of how much importance it is that the abstract should be full and correct, in stating all [\*114] words which may \*raise the question, whether an estate is vested or contingent.

Except in special cases, falling within the scope of the observation already made, the common form of abstracting deeds is sufficiently correct ; thus to *A* for life, remainder to *B* in tail.

Contrasted with remainders, are limitations by *shifting use*, and some species of *executory devise*.

It is the nature and essential property of a remainder, to take effect upon and after the regular and proper determination of a prior particular estate.

Remainders owe their operation and effect to the rules of the common law.

A remainder would be void if it aimed at the determination or avoidance of the particular estate, before it had completed the measure of its time.

So a remainder would be void if it left any interval between the determination of the particular estate, and the commencement of the remainder : as in the example of a gift to *A* for life, and from and after the death of *A* and one day, (without limiting any estate for that day,) then to *B*. As *B* is to wait for the expiration of the day, the remainder is void.

But a limitation by *executory devise*, or by *shifting use*, may be good, although it is to defeat the particular estate, or prior [\*115] fee, wholly or in part ; or is to leave an interval between \*the determination of the particular estate, and the commencement of the estate which is next limited.

Clauses for *shifting the estate* from one branch of the family to another ; and all conditional limitations by *executory devise*, and *shifting use*, and all estates arising from the execution of powers, operate either by way of *executory devise*, or of *shifting use*.

On these important topics it will be necessary to enlarge in a future page.

*Of the person to whom the limitation is made.*

All that is necessary to be observed on this head is, that the abstract should give the description of the person in the same terms as this description occurs in the deeds.

This is more particularly important when the person who is to take is designated by special terms ; as the children of *A* living at his death, the first-born son of *A* who shall attain twenty-one, or the like.

In all these and the like instances, every part of the description



is material, and should be given at large. The more special the circumstances of description may be, the more incumbent it is on the solicitors to take care, and for the conveyancer to require, that the abstract should contain a full and faithful transcript of this part of the deed.

Sometimes also the construction of the words of express limitation is influenced by the context of the deed or will, and more particularly \*by the clause introducing the limitation in [\*116] question, or by the clause which introduces the next estate, or by some proviso of shifting or springing use. Each such clause, as often as it can materially vary the construction, should also be given at length.

*Of the duration of the estate.*

The duration is marked sometimes by the terms which are descriptive of the persons who are to take as the *heirs of the body*, when these words are used as words of purchase. At other times by words of *superadded limitation*, as to the *heirs of the body, and the heirs female of their bodies*, or the like, or to the first son, and the *heirs male*, or *heirs of his body*, &c.

In abstracting words of limitation, marking the duration of the estate, it is very common in practice to give their effect, instead of stating the terms of the deed; thus, 'to *A* for life, remainder to *B* in tail; remainders to the first and other sons of *B* successively in tail, remainders to the daughters of *A* in tail, with cross-remainders between them in tail, with remainder to *A* in fee.'

Nor is there any decisive objection against this practice, when the construction, and consequent effect of a deed, are so clear and indisputable that no doubt can exist on the effect. But when a deed or will is abstracted in this mode, it is particularly incumbent on the solicitor for the purchaser to take care that the effect of the limitation is correctly given in the abstract.

\*And it is always more satisfactory to the conveyancer to [\*117] have the words of limitation, that he may judge of their operation; and draw the conclusion for himself: and counsel, however irksome it may be to him; and it is truly irksome, should require the language of the deed, will, &c. to be set forth, whenever he has reason from the structure, the form, or the language of the abstract, to suspect the competency of the solicitor to give a correct statement of the effect of the deed or will.

There are a few points falling under this head which deserve to be particularly noticed, since abstracts are, in these particulars, frequently made without sufficient attention to accuracy.

1st, The use, and the estate to serve the use, are sometimes blended by mistake. A conveyance is stated to be '*to and to the use of A* in fee, *to uses*, &c.' while, in fact, the deed is correct, and the conveyance is made *to A* in fee *to uses*; so that the uses are executed by the statute for transferring uses into possession, and not exposed to the objection of being uses on an use in *A*, and, for

that reason, trusts in the second degree, on which the statute cannot operate.

2dly, In abstracting marriage settlements, it is not an uncommon mistake to distribute part of the clause, expressive of the use, to the limitation of the legal estate.

Thus the habendum is stated to be to *A* and his *heirs* [\*118] *from and after the marriage*; thus \*incorporating part of the use, limiting the estate to the settler and his heirs till marriage.

A common law conveyance, which suspended its operation till the marriage, would be void, as limiting an estate of freehold to commence *in futuro*, and as placing the *freehold in abeyance*. [Essay on Estates, ch. Freeholds.]

This inaccuracy should be avoided; the form may be to *A* and his heirs; *To uses, to take effect after the solemnization of the marriage*, viz. &c. then stating the uses.

Even this form would not provoke inquiry, since the limitations would be good, as future springing uses, even though there were an omission of the usual limitation to the settler, and his heirs, or uses to the like effect.

But as often as the limitation of an use till marriage is inserted, the correct form of the abstract will be,

*To the use of B and his heirs till the marriage*, and after the solemnization of the marriage.

Then,

*To the use of, &c. &c.*

Some gentlemen state the uses thus; ‘to *A*, till the marriage, remainder to the use of,’ &c.

Every person understands the sense of the word remainder thus used. It is, however, in a technical sense, inaccurate. For the limitations after marriage are not remainders. They are to operate by way of shifting use, as a substitution for the fee limited to the settler till marriage, should that fee cease by the marriage.

[\*119] \*3dly, In various instances, though the will depends on a power which has defeated all the uses and trusts, yet the uses and trusts are stated as if they were relevant to the history and deduction of the title.

So many of them only as may show the right to exercise the power, are necessarily, or indeed properly, stated, when the title is rested on the power, and the appointment exercising the power.

But when the sale, or appointment under the power, has been questioned, or its validity is doubtful; or when there has been a confirmation by the persons who would have been entitled, in the event that the power had not been exercised; then the ulterior uses, as far as they are relevant to the title, are, with great propriety, to be inserted in the abstract.

So when there is a power of appointment, and limitations over in default of appointment, and the title has been completed under the

power; it is not, except under such circumstances as are already noticed, necessary to state more of the ulterior uses, than give estates or interests to the person or persons under whose appointment the title is derived.

4thly, It is common to say, 'with remainder to trustees for supporting contingent remainders; or remainder to trustees and their heirs for supporting contingent remainders;' this particularly, when the limitations are of legal estates, suggests an inquiry, whether the fee \*may not be vested in the trustees. See [\*120] *Doe v. Morris*, 7 Term Reports. *Compere v. Hicks*, ib. and consequently the ulterior interests are not merely equitable, instead of being legal interests.

As often as the fact will warrant it, it should be shown that the limitation is to the trustees, and *their heirs during the life, &c.* Or, if the omission of the words *during life, &c.* be in the deed itself, the abstract should be so given by marks of quotation, or with a marginal observation, showing that there is such an omission in the deed; or the ulterior limitations should be stated, if there be any from which it may be collected, that by the context of the instrument, and the construction of law, the former limitation is merely for life, as by a repetition of a like limitation to the same trustees, as in *Doe v. Hicks*, 7 Term Reports, 433; or by the limitation to them of a term of years, as in *Curtis v. Price*, 12 Vesey, 89.

In these instances the subsequent limitation showed the intent, so that the former estate must, in order to preserve consistency, be merely for life. See *Shapland v. Smith*, 1 Bro. C. C. 75.

5thly, In abstracting the limitation to the first and other sons, &c. or to daughters, the clause is expressed as a limitation to them and their heirs male, or to them and their heirs, when in point of fact, there are, either in terms, or in construction of law, *words of procreation* descriptive of the body from which these heirs \*are to proceed so as to convert the words of limitation into [\*121] an estate tail.

Such words, whether they are contained in an express limitation, or in words introduced into the limitation over, ought to be stated. On the other hand, if the defect in this particular, exist in the deed, it should be noticed in like manner as in the limitation to trustees for supporting contingent remainders.

6thly, Even when a limitation over has special terms, which have the effect to abridge the import of words of limitation in a former clause; or to suspend by words of contingency the vesting of the remainder; it is common, in abstracts prepared without sufficient skill, to give the limitation over, by saying '*remainder to.*' This is inaccurate, as it does not disclose the real state of the title; either as to the words of qualification, or the words of contingency; and in either case, if the limitation be material to the title, it necessarily leads to an inquiry for a correct statement of the deed, and produces delay, and a great increase of trouble and expense.

*Of the Words of Modification.*

THESE are words which sever the tenancy, by declaring that two or more persons shall hold as *tenants in common* ; or that several persons shall take *successively, according to the priority of* [\*122] *their births, or, in the order in which \*they are named, or, that daughters or children shall have cross-remainders.*

These clauses should appear on the abstract, so far at least as to show their effect : and as often as the words are special, and may admit of a doubt on their construction, the abstract should be full in this particular.

*Further observations on words limiting the estate.*

In abstracting deeds and wills, &c. which have a long series of limitations to different persons for their respective lives, with remainder, after the death of each person, to his first and other sons, &c. in tail, several courses are observed.

Some gentlemen abstract all the limitations, and this is right, as often as the title may be aided under some of the more remote limitations ; or it depends on them, by reason of the failure of the prior estates.

Other gentlemen are content with giving the limitations, as far as they are material, to the title ; and this is the more scientific mode of preparing the abstract. For instance, if *A* be tenant for life, with remainder to *B* in tail, with divers remainders over, and the title depends on a common recovery, duly suffered by *B*, so that he has barred the estate tail, and the remainders dependent on the same, they are satisfied with stating the title, so as to show the creation of this estate tail, and noticing that there were divers remainders over.

[\*123] \*This mode saves a considerable portion of trouble to the conveyancer, by confining his attention to this estate tail, as the foundation of the subsequent title.

When a title depends on a very remote estate tail, or a remainder in fee, the abstract is sometimes given shortly to this or the like effect, '*after divers particular estates for life, and in tail, which are determined, to A in tail, or to A in fee.*'

There is not any great objection to this form of abstract, when the limitations in question are contained in ancient deeds, and the title has for a long series of years, been held under this remote estate tail, or remainder in fee. But in abstracting deeds of a modern date, and all deeds executed within the last sixty years seem, for this purpose, to fall under this description, the prior limitations should be shown, that the purchaser may satisfy himself of the fact, that the estates given by the prior limitations are determined, and that they were determined before such time, as it may be material to consider them as determined, namely, before a recovery was suffered, &c. and that no fines were levied, recoveries suffered, or encumbrances created, which can affect the title.

There is one instance, however, in which all or many of the limitations ought to appear in detail ; and there may be other instances of a similar nature, though they do not occur to the mind at present. The instance in \*contemplation, is of an act of [\*124] parliament obtained for the sale of estates, or for their exchange, &c.

All the limitations should be introduced, or so many at the least as will show the application of the *saving clause*.

The recitals in the act of parliament will, in general, afford a clue for deciding on the limitations to be abstracted.

At this point it is in-course to consider the difference between limitations in deeds, operating wholly by the rules of the common law, and deeds operating under the learning of uses, or partly under that learning.

1st, By the rules of the common law every remainder must be preceded by a particular estate.

2dly, When a contingent remainder is limited, the particular estate must be of freehold at least ; or if there be an estate for years, it must be followed by an estate of freehold ; so that such estate of freehold may precede the contingent remainder ; thus, if the intention be to give an estate of freehold or inheritance on an express contingency ; or to a person not in existence ; or to a person not ascertained, it is essentially necessary that there should be a prior limitation to a person who may receive an estate of freehold as a vested interest. And this rule equally extends to assurances perfected by livery of seisin, and to deeds operating merely as grants.

These rules proceed from the anxiety of the law to prevent the abeyance of the freehold ; and \*the learning on the [\*125] subject, with its consequences, and the rules deducible from the same learning, will be found in the Essay on Estates, Chapter on Freeholds.

These rules are,

1st, The freehold cannot be in abeyance.

2dly, The inheritance or an estate of freehold, expectant on an estate of freehold, may be in abeyance.

3dly, An estate of freehold or of inheritance, limited by way of contingent remainder, must vest during the prior particular estate created by the same instrument, or *eo instante* that it determines.

4thly, Such estate must continue either as an *estate*, or as a *right of entry*, and not merely as a *right of action* ; and hence the deductions and consequences that a contingent remainder may be destroyed, unless it vest before the particular estate has been destroyed by *tortious alienation*, as by feoffment, fine, or recovery ; or before it has been defeated by *forfeiture*, *surrender*, or by *merger*.

These rules, however, are applicable only to limitations of the *legal estate* : for limitations of *trust* cannot be destroyed by the alienation of the particular tenant, or by the surrender, merger, or determination of his estate. And estates of *copyhold tenure* cannot be destroyed by any act of the particular tenant : but the better opinion

is, that a contingent remainder of copyhold lands may fail  
 [\*126] of effect, by reason of the \*determination of the prior particular estates, before the remainder can vest in interest.

The rule applies to all legal estates bearing the relation to each other of a particular estate, and a remainder, without regarding whether they are created by limitation in deeds operating by the rules of the common law, or by limitations of use giving legal remainders; or by limitations in a will giving remainders of the same description.

Other propositions flow from the same rules:

1st, At the common law a fee cannot be mounted on a fee; or as the rule is differently expressed, one fee cannot be limited after and expectant on another fee; or to take effect, on any event, or condition by which the prior fee is to be determined or defeated; but even at the common law *one fee may be limited as a substitution for another fee*, in the event that such remainder should never give a vested interest. Each remainder will, in its inception, be contingent, and as such be liable to destruction.

2dly, Every remainder must be limited, so that it may have the capacity of taking effect on the determination, whenever that determination may take place, of the prior estates: for, as already noticed, a limitation which is made with an interval between the particular estate, and the remainder, will be void.

Thus, a grant to *A* for life, and from and after the death  
 [\*127] of *A* and one day, one week, \*and one year, to *B*, then to *C* in fee, will not be good, as far as the gift is in favour of *B*; since the form of the limitation precludes him from taking the possession immediately on the death of *A*; which is the regular and proper determination of the particular estate: but a gift to *A* for life, and from and after the death of *A* and *B*, then to *C*, is not open to this objection. The remainder is contingent, because it is not necessarily to take effect in possession, whenever the possession shall be vacant; but it is not necessarily void, because by the death of *B* during the particular estate, it would be capable of taking effect on the regular determination of the particular estate. In the former example, the limitation expressly excludes the remainder-man from enjoyment for a time beyond the determination of the particular estate, while in the latter instance there is merely a possibility that there may be an interval; and the law has provided for the case, by treating the remainder as contingent, so that it may vest or fail of effect, as the event may arise. It excludes the remainder from being vested, since as a vested remainder it would, contrary to the intention of suspending the right to the possession till the death of the survivor of two persons, have the capacity of taking effect in possession on the determination of the prior estate, although that estate should determine while one of these two persons should be alive.

[\*128] 3dly, A remainder cannot be limited to \*commence on an *illegal act*, as by murder, &c. And,

4thly, It is said that a remainder cannot take effect upon what the law calls a double possibility; or *a possibility on a possibility*.

The cases given in illustration of this branch are better understood by referring them to some ground which is more intelligible. The examples are of a gift to *A* for life, with a remainder to a corporation, when, in point of fact, no such corporation exists; or a gift to *A* for life, remainder to the first son of *B*, while no such person as *B* is in existence, or known.

These cases may be easily accounted for on principles of law, without resorting to the quaint and unintelligible terms of a possibility on a possibility.

The true ground of these cases seems to be, that,

1st, The gift to a corporation, while in fact no such corporation exists; or a gift to a person *tanquam in esse*; or to the first son of a person *tanquam in esse*; while in point of fact, no such person is in being, is void for want of capacity or uncertainty.

Suppose the gift to be to *A* for her life, and after her death then to such son, to be baptized by the name of *C*, as *B* shall have by a woman whom he shall marry, and who shall, at her marriage, be called by the name of *C*: in this instance there is a treble contingency.

1st, There must be a marriage with a woman of a particular name.

\*2dly, She must have a son of the marriage. [\*129]

3dly, The son must be baptized by a particular name.

And yet no lawyer would hesitate to admit the validity of a remainder in these terms.

Of course the cases of possibility on possibility must be understood as confined to instances in which the remainder is void, either from the *uncertainty* of the person who is to take, or from the gift being to persons particularly designated, while, in point of fact, there is not any person answering that description.

The rules of tenure do not apply to trusts or equitable estates.— For this reason, a particular tenant cannot divest or discontinue the remainders; nor does the rule respecting the abeyance of the freehold apply in reason, nor is it applicable in practice, to the determination of the particular estate before the remainder can vest, and, therefore, the remainder, if good in its creation, may take effect, without regard to any accident which may happen to the particular estate.

Limitations of future use open a wide field for distinctions. The general proposition applicable to them is, that they are to operate either as springing or shifting uses, or as remainders.

When they are to operate as remainders, they are subject to the rules which concern remainders; and therefore the remainder, if contingent, may be destroyed, in the same manner [\*130] as it might have been destroyed if it had been introduced into a conveyance operating by the rules of the common law.

It is also a rule, that no limitation shall operate by way of shifting or springing use, or executory devise, if consistently with the inten-

tion of the parties it may operate as a remainder, either vested or contingent.

It follows, that no limitation in a deed, or even in a will, will be referred to the learning of shifting or springing uses, or to the learning of executory devises, if it can, by any reasonable construction of the deed or will, take effect as a remainder.

A few instances will exemplify the distinctions.

1st, A limitation by will, or a limitation of use to *A* for his life, and from and after the death of *A* and *B* to *C* in fee ; or to a person unborn ; or to a person not ascertained, will give to *A* a vested estate for life with a contingent remainder, expectant on that estate, to *C*, or other donee of the remainder. But when a gift by will, or limitation of use, is made to *A* for years, and after the determination of that term, then to another person on a contingency ; or to a person not in existence ; or to a person not ascertained : or when a devise is made to *A* for her life, and from and after the death of *A*, and one day, or one year, then to another person, whether ascertained or not ascertained, or whether in existence or not [*\*131*] in existence ; in all these instances the limitation over cannot be good, consistently with the law respecting remainders.

For want of a prior estate of freehold for its support, the gift is capable of validity only by calling in the aid of the law, concerning executory devises, or springing or future uses.

So if a gift be made by will, or limitation of use, to *A*, in fee, and upon some event it is directed that the estate of *A* shall cease, and the land shall remain to *B* in fee, or to *B* for life, with limitations over ; resort must be had to the learning of executory devises or shifting uses ; because these limitations over, after a fee, or in derogation, abridgment, or destruction of a prior estate, are repugnant to the rules of the common law.

These and the like distinctions are relevant to all other interests arising out of wills or limitations of uses, in which, either under the learning of powers, or conditional limitations, one estate is to take effect in derogation, or in abridgment, or in exclusion of another estate : but to guard against inconvenience, the law has prescribed, by the rules against perpetuities, the limits within which these gifts by executory devise, shifting or springing use may have effect : and, with the exception of limitations which are to defeat estates tail, and which by another rule of law applicable to estates tail, may be barred by a recovery suffered by the tenant in tail, no limitation [*\*132*] by way of shifting, or springing use, or executory devise,

will be good, unless it be so limited, that it must vest or fail of effect, within the period of a life or lives in being, and twenty-one years beyond the death of the surviving life, and the period of gestation : and two periods of gestation are allowed, one for the commencement of the period, and the other for the determination thereof, as in the instance of a gift to a child, with which *A* is ensient, in fee ; and in case he shall depart this life under the age of twenty-



one years, then to his first son in fee ; and in case such first son should die under the age of twenty-one years, then over.

The doctrine of executory devises, and shifting and springing uses, is bottomed partly on the learning of limitations, and partly on the learning of conditions ; and the limitations themselves are distinguished by the appropriate terms *conditional limitations*.

The rules of law respecting conditions, will be found under the division which treats on that subject ; as it is of the first importance to distinguish accurately between rules which govern the limitations of estate by conveyances operating under the rules of the common law ; and limitations of use in conveyances to uses, or by bargain and sale, and covenant to stand seised.

A general outline of these rules is given in vol. 2, Of the Practice of Conveyancing, p. 194 ; and though it would be convenient, it is not deemed justifiable, to introduce them in this place.

*\*Of the Declaration of Trust.*

[\*133]

TRUSTS are of several descriptions :

1st, Those which limit estates in a special manner, as to A for life, remainder to his first and other sons in tail, or the like.

The observations on uses are applicable to trusts of this description ; except that contingent remainders of a trust cannot fail of effect by the determination of the particular estate, or any alienation by the owner thereof. Nor is the doctrine of the common law, which imposes the necessity of a prior particular estate, in any manner, or in any instance, applicable.

2dly, Trusts by way of power ; as upon trust for such persons, &c. as A shall appoint, and these trusts fall under the same consideration as powers.

3dly, Trusts which direct a settlement, &c. a sale, &c. an exchange, &c. the payment of debts generally, the payment of scheduled debts ; the payment of portions, of money to be raised by way of mortgage for particular purposes ; varying the mode of trust with all the various exigencies of families or individuals.

Trusts of this description should be abstracted as far as they are material to the title.

Two objects are to be particularly regarded ; viz.

To show so much of the trust, as will satisfy the purchaser that the act which was directed to be done, has been duly performed, or has failed of effect, as far as it is material to the [\*134] title ; and if it be incumbent on the purchaser to see that the money arising under the trusts has been duly applied, then the trusts which direct the application should be stated.

In abstracting the trusts there should be shown the act to be done, as to sell, &c. the exchange, &c. by whom it is to be done ; the time, if any time be pointed out, at or before which the trust is or is not to be performed ; under what circumstances, when any circumstances are imposed as material ; with whose consent, or at whose

request, if any such consent or request be made requisite ; the mode by which any act is to be done, if any mode be pointed out, as by deed, &c. by auction, &c. ; the manner in which any act is to be done, as by deed, will, &c. if any mode be prescribed ; the person in whose favour the act is to be done ; as in favour of any particular person, or a class or description of persons ; and when the nature of the trust requires it, the purchaser should see that all these requisites have been observed, and the documents which prove the observance of these requisites should be abstracted.

But in most trust deeds prepared with skill, there are contained provisions, that the receipts of the trustees should be sufficient discharges ; and that the purchasers should not be bound to see to the application of their money : and in some cases the purchaser is exonerated from inquiring whether such sale or mortgage be [\*135] \*necessary for the purposes of the trust ; or whether any notice required by the terms of the trust has been given.

In abstracting deeds containing this or the like provision, when the provision has been acted upon by payment of the money pursuant to this provision, then there is not any occasion to state the trust directing the application of the money.

But if no such provision be contained in the deed or will ; or if the parties are dealt with on the foundation of their ownership and beneficial interests, independently of this provision ; then the trusts which direct the application of the money should be stated, and care should be taken to see that the money has been duly applied according to the trusts.

This observation is equally applicable to all transactions which have taken place within a reasonable period, say thirty or forty years.

Trusts are either *executed* or *executory*.

Trusts executed are equitable estates fully and finally limited by the parties. Trusts executory are trusts which require a settlement to be made for expressing the use or trust in formal and definite terms.

All trusts are, in some degree, executory ; but they are not executory in this sense. See *Essay on the Quantity of Estates, introductory chapter*, and *Succinct View of the Rule in Shelley's Case*.

In regard to trusts, it is therefore necessary to consider whether they are executed or executory ; for the trusts fully declared, and giving \*equitable interests, are construed by [\*136] courts of equity in the same manner as the like limitations of the legal ownership would be construed.

Yet courts of equity adopt a different rule for the construction of *executory trusts*. These courts look to the object of the instrument, and the intention of the parties, and treat the language of the trusts as short heads of an agreement, to be carried into effect by a more formal settlement, and thus amplify the expressions, and control any legal construction, which does not quadrate with the intention.

The following note, by Mr. Watkins, will afford ample and very useful information on this head :

"As in marriage articles, a provision for the issue appears to have been the chief end in view, a court of equity will often consider them as purchasers (1 P. Wms. 145, *Bale* and *Coleman*, ib. 291, *Seale* and *Seale*), and decree a strict settlement on the children, in order to prevent one of the parents only from frustrating that intent, by destroying the entail which might otherwise have taken place in the parent according to its legal construction.

"And therefore, where there is no danger of such end being so defeated, a court of equity will not interfere, but suffer the words to have their legal operation, and the entail to remain in the parent, as where the wife is made tenant in tail of lands moving from the husband, 2 Ves. 358, *Howell v. Howell*, 2 Atk. 477, in the case of *Green v. Ekins*, and 1 Fearne, 131, 162, 2 P. Wms.

356, note. But it seems \*that this rule will not hold as [\*137] to copyholds, the statute 11 Hen. VII. c. 20, not extending to them, see 2 Cruise 158, 2 Ves. 358, note. For where the power of altering such trusts has been vested in both parents, the court has refused to interfere, 2 Ves. 358, *Whately v. Kemp*, cited 1 Fearne 132, &c.

"So where a strict settlement appeared to have been manifestly contrary to the intent of the parties, 2 Ves. 358, 9, 1 Fearne 135.

"Nor will the court interfere where a settlement has been made by the parties subsequently to the articles, but before marriage; for the settlement will in such case be considered as a new agreement, and to control them, Cas. Temp. Talb. 20, *Legg v. Goldwire*, 1 Fearne 154, 2 P. Williams 356, note.

"Unless such settlement be expressly alleged to have been made in pursuance or performance of the articles, so that the presumption of a new agreement be done away, 1 P. Williams 123, *Honor v. Honor*, 2 ibid. 349, *West v. Erissey*, 356, note, Cas. Temp. Talb. 20, *Legg v. Goldwire*, 1 Fearne 138, &c.

"But where the settlement is made after marriage, the court will set up the articles against the settlement, 3 Atk. 371, *Hart v. Middlehurst*, Cas. Temp. Talb. 20, *Legg v. Goldwire*, ibid. 176, *Streafeld v. Streafeld*, 2 Atk. 39, *Glanville v. Payne*.

"Yet where other property of a parent is limited to any of the issue, and the issue so provided for, bring a bill for carrying the articles \*into strict settlement, the person so [\*138] bringing the bill, shall in many cases be put to election before the court will decree the execution of them, Cas. Temp. Talb. 176, *Streafeld v. Streafeld*; see 2 Atk. 39, *Glanville v. Payne*.

"But if there were no articles entered into previously to marriage, there can of necessity be none to control a settlement made afterwards, and where there are not articles as well as a settlement, the court will not construe words which make a legal estate tail

in the parent to [provide for] the first and other sons, &c. 3 Atk. 294, *Warwick v. Warwick*, 2 Atk. 39, *Glanville v. Payne*.

"Unless indeed there is a direct declaration in the recital of the settlement, that it was the intention of the parties to make a provision for the issue by securing the premises settled for their benefit, in which case the court will effectuate such intention by decreeing a strict settlement, if the words of the deed would otherwise give an estate tail to the parent; enabling such parent at law to defeat the provision for the issue, contrary to the recited intention. But where the recital is to assure the lands in general terms, or expressly to settle them "to the uses thereafter mentioned," a court of equity will not interfere, but suffer the words to have their legal effect, see 3 Br. Cha. Cases 27, *Doran v. Ross*, 1 Ves. jun. 57, S. C. and 170, 1; and see 2 Ves. 358, *Howell v. Howell*, and *antea*, and Cowp. 12, *Moore v. Magrath*.

[\*139] "And note, that in case of articles, it is not enough that they be recited, they must also be produced, *Ambler 515, Cardwell v. Makeril*, and 1 Fearn 159.

"Nor will a strict settlement be decreed in favour of collaterals, unless it should be apparent from the circumstances of the case, that they were included in the considerations; for the intention of such articles seems, *prima facie*, only to provide for the issue of the marriage; or unless the articles be decreed as to the persons first claiming, in which case the court will decree in their favour, as it always executes articles in *toto*, or not at all, see 10 Mod. 533, *Osgoode v. Strood*, 2 P. Wms. 245, S. C. 2 ib. 594, *Vernon v. Vernon*, 1 Ves. 73, *Stephens v. Truman*, 3 Atk. 186, *Goring v. Nash*.

"But as the chief view of the court is to secure a provision for the issue, independently of the parent, it will decree an execution in favour of the children of the party covenanting to convey, and for whom that parent was morally obligated to provide, although such children be not the issue of the very marriage in consideration of which the articles were entered into, as those of a former or of a future marriage; or where a father covenants to settle lands on the marriage of his son, with remainders over to a daughter, and the heirs of her body, it will carry the articles into execution in favour of the issue of the daughter, since the father was morally obliged to provide for her also. See the cases last cited, [\*140] and particularly *Goring v. Nash*, \*1 Ves. 216, and 1 Atk. 265, *Newstead* and others against *Searles et al.* Cowp. 710, *Doe ex dem. Watson v. Routledge*.

"In cases of wills\*, where the claimants are merely volunteers, the court will not aid. See 1 Fearn 163. See also 2 P. Wms. 684, n. 1 *Barnwell v. Large* (cited).

"Nor will equity decree a strict settlement even in the case of

\* Except when there are trusts to be executed by a settlement.

articles against purchasers for a valuable consideration, and without notice, 3 Atk. 291, *Warwick v. Warwick*, 1 Fearn 156.

"But a settlement, though made after marriage by a person not indebted at the time, will be good against subsequent creditors, 1 Atk. 15, *Russell et al. v. Hammond et al.* ib. 265, *Newstead v. Searles*, 2 Ves. 11, *Lord Townshend v. Windham*, 2 Bro. Cha. Cases, 90, *Stephens v. Olave*, Cowp. 705, *Doe d. Watson v. Routledge*."

Again, those trusts which are not executed by the statute are to be carefully distinguished from uses which are executed by the statute.

1st, They are of *chattel interests*, for no use can arise under the statute, unless there be a *seisin* to serve and supply the use. But a term of years in a limitation of uses of the fee, or of an estate of freehold; or a term of years bargained and sold by a person who has a fee, or an estate of freehold, may be executed into estate by the statute.

But an assignment of a term, or other chattel \*interest [\*141] to *A*, in trust for *B*, will leave the legal estate in *A*. The trust will not be executed by the statute of uses; on the contrary, it will remain an equitable interest.

So a demise by a termor for years, by words of bargain and sale, to *B*, will not, for want of a *seisin*, operate as a bargain and sale by force of the statute of uses, but as a demise at the common law, and be a mere *interesse termini* till entry.

2. So there cannot be any use to be executed of copyhold lands, on a surrender of them by the copyholder; he has no *seisin*. The uses declared in customary surrenders, confer a legal estate by the rules of the common law. Any uses declared of the estate of the person admitted as copyhold tenant, will be trusts subject to the jurisdiction of a court of equity.

3. An use on an use will be a mere equitable interest. The first use only, and not the second use, will be executed by the statute. Therefore, on a common law grant from *A* to *B*, in fee, to the use of *B* in fee, in trust for *D* in fee; or by *A* to *B* in fee, to the use of *C* in fee, in trust for *D* in fee; or a bargain and sale, under the statute of uses, to *A* in fee, to the use of *D* in fee; or an appointment made under a power in a conveyance to uses, to *A* in fee, to the use of or in trust for *D* in fee, will give *D* an equitable interest only, and not a legal estate.

In the first case, the use declared in favour of *B* is void as an use, and though *B* will be seised \*by the rules of the [\*142] common law, that use will in point of legal effect, though not in equity, exclude the use declared in favour of *D*. The judges presiding in courts of law treat the use declared in favour of *D* as repugnant to the use declared in favour of *B*; but equity treats *B* as a trustee for *D*; that *B* may not retain the beneficial ownership contrary to the declared intention of the parties.

In the second instance, *C*; in the third instance, *A*, the bargainee;

and in the fourth instance, *A*, the appointee, is the *cestui que use*; and the use or trust in favour of *D* is an *use on an use*, or an use in the second degree; and the first use only is regarded by courts of law, while the courts of equity will maintain the second use as a trust. Thus the first use only will be operated on by the statute of uses.

Distinctions however exist which must be carefully regarded.

1, A conveyance to *A* in fee, to the use of *A* in fee, with a shifting use on some event, to *D* in fee, will enable the statute to operate on the use to *A*; so that he will be seized by force of the statute, and not by the rules of the common law.

So in this instance, or in any other example of an use, with a like shifting use in favour of *D*; the use to *D* may be executed by the statute, because the use to *D* is not an use on an use, or an use in the second degree. It is one use substituted for another [\*143] use; and exempt \*from the objection which, in other cases, renders the interest of *D* merely equitable.

Again, although a bargain and sale of an use to *A* in fee, will not admit of a declaration of use on the seisin of *A*, so that the second use may be executed by the statute; the same reasoning does not apply to a bargain and sale operating by the rules of the common law; as in the instance of a bargain and sale by executors having an authority to sell, or a bargain and sale under the land tax and other like acts. In cases of this sort, a common law seisin will pass to the bargainee, and uses, capable of execution under the statute, may be declared of this seisin.

Again, though no use, to be executed by the statute can be declared of the estate of an appointee of an use, because he himself is merely a *cestui que use*; yet an appointee, under a common law authority to sell, would obtain a common law seisin; and uses to be executed by the statute, may be declared of that seisin.

Lastly, trusts, which are not uses, as trusts to sell, to raise portions and the like; and also, trusts which, though they in effect give the use, yet require that the legal estate should remain in the trustees, as trusts for the separate use of a married woman; trusts to receive and pay, or apply the rents as distinguished from an use; or trusts to permit another person to receive the rents. *Burchett v.*

*Durdant*, 2 Ventr. 312, *Broughton v. Langley*, 2 Lord [\*144] Raym. 873, \**Horton v. Horton*, 7 T. Rep. 652, *Shapland, v. Smith*, 1 Bro. C. C. 75, *Silvester v. Wilson, Williams'* note to 2 Saunders, p. 11, and as distinguished from trusts in the alternative, to pay to *A B*, or to permit him to receive and take the rents, &c. *Doe v. Biggs*, 2 Taunton 109, are trusts which remain subject to the jurisdiction of courts of equity, and are not transferred into estate by force of the statute of uses.

Some of these trusts give mere chattel interests, in the nature of personal estate; others give freehold interests, and even interests of inheritance in equity. Thus there may be equitable estates for years, for life, in tail, and in fee.

The general rules concerning trusts, or equitable estates, are,

1. The *cestui que* trust is the beneficial owner in equity, and has an equitable estate.

2. This estate gives the *like power* of alienation in equity, as may be *rightfully* exercised at law, by the owner of a like legal estate.

3. The like limitations may be made of the equitable, as may be made of the legal, ownership.

4. The limitations of trust, or equitable estates, receive the like construction, as if they were limitations of the legal estate.

5. Whenever a limitation of an use would be good by the rules of law, a like limitation of the trust or equitable ownership will be valid in equity.

6. Any limitation which, as tending to a \*perpetuity, [\*145] would be void if it were of an use, will be void if it be of the trust or equitable ownership.

7. Of equitable estates, there cannot, in a technical sense, be any disseisin; and therefore, notwithstanding adverse possession, there may be transfers or dispositions by the equitable owner, either by deed or will.

In *Philips v. Brydges*, 3 Ves. 127, Lord Alvanley stated the rules of equity applicable to trust estates to be, that such equitable estates are to be held perfectly distinct and separate from the legal estate. They are to be enjoyed in the same condition; entitled to all the same benefits of ownership; disposable, devisable, and barable, exactly as if they were estates executed in the party; and the persons having them, may without the intervention of the trustees, or the possibility of their preventing them from exercising their ownership, act as if no trustees existed; and this court will give validity to their acts.

There are some qualities of legal estates, which are not common to the corresponding interests of the equitable ownership.

1. A particular tenant of the legal estate, either for life or for years, may forfeit his estate by levying a fine, and other like acts. But no act done by a tenant of a like equitable estate will be a forfeiture of his estate.

2. A tenant for life of a legal estate may, by feoffment or fine, divest the remainder or \*reversion, and turn such re- [\*146] version or remainder into a right of entry, and require a wrongful fee. *Goodright v. Forrester*, 1 Taunton, 578. No such effect will be produced by any alienation of the equitable owner of a like estate, since there cannot be any disseisin of an equitable estate.

3. A tenant in tail in possession of the legal estate may discontinue the estate tail, and the reversion and remainder, and turn them into a right of action without barring them. But no alienation by a tenant in tail of an equitable estate tail will operate as a discontinuance.

4. Contingent remainders of the legal estate may be destroyed by the determination, the tortious alienation, surrender, or merger of the prior particular estate, by which the remainder is supported; while no such consequence will be induced; as to a contingent re-

mainder of the equitable ownership, by any act proceeding from the tenant of a prior particular estate of the same ownership.

5, Owners of legal estates cannot convey without certain ceremonies, as livery of seisin ; a lease, or bargain and sale, as a foundation for a release ; enrolment of a bargain and sale, &c. &c. But an equitable owner may convey by any deed which contains evidence of an intention to grant his estate. Such equitable grant must, however, have formal words of limitation.

6, Though it be a rule of law applicable to legal estates, [\*147] that "*quod meum est, sine facto meo*" (alienation,) *sive defectu meo*, (forfeiture, &c.) *amitti, vel in alium transferri non potest* ;" yet an equitable estate may be lost by the alienation of the trustee to a purchaser, for a valuable consideration, and without notice ; and it may be lost by escheat from the trustee, as a consequence of his attainer, either for treason or felony.

Some of the consequences attaching on equitable estates are,

1, On the failure of heirs of the equitable owner of the fee, there will not be any escheat to the lord. The trustee will have the benefit of the estate. *Burgess v. Wheats*, 1 Black. Rep.

2, On the escheat of the legal estate, the lord will hold discharged of the equitable estate.

3, Equitable estates are subject to curtesy, but they are not subject to dower or freebench.

4, These estates are, by *statute law*, 29 Car. 2, subject to executions, for the debts of the *cestui que trust* ; only, however, while the trustee continues seised for the benefit of the debtor.

5, Equitable estates are descendible in like manner as legal estates ; and there may be a *possessio fratris* of an equitable seisin.

*Of Conditions ; conditional Limitations ; Clauses for Redemption ; and other special Agreements.*

CONDITIONS may defeat the estate ; and if they exist, [\*148] they should be stated fully ; that it \*may appear in what degree, and to what extent, they may operate, and upon what terms, and by what mode, they may be discharged or avoided ; and if they have been performed, the material circumstances should also be stated, that an opinion may be formed, whether the condition has been discharged.

This caution is equally necessary in application to conditional limitations, by way of shifting use.

Of the nature of conditions also are provisions introduced into conveyances to uses, and annexed to terms for years, for the purpose of defeating the same.

In general, abstracts are too concise in giving this proviso, in those instances, in which the proviso is relied on as having caused the cesser of the estate.

The proviso ought to be fully stated, that it may appear, whether



the circumstances which have taken place, are such as fall within the scope of the terms of the proviso, so as to be a performance of the condition.

It is not sufficient, that the portions have been paid or satisfied to bring the proviso into operation. They must have been paid or satisfied in the mode, and by the person, and within the time prescribed by the proviso, unless the proviso has words for the cesser of the term, when the trusts thereof have been performed or satisfied, discharged, or become unnecessary, or some such like words.

\*Provisoes for redemption are to be stated shortly or [\*149] fully, according to circumstances.

When they contain any special provision, as a settlement of the equity of redemption, such special circumstances should be fully disclosed. With this exception, there is not any necessity for detailing more of this proviso than will show by whom the money is to be paid, the sum to be paid, the time of payment, and the rate of interest reserved.

However, if the mortgage be existing, or if the deed which contains the mortgage be, from the circumstances of the case, such as would be necessary to be recited in the deeds to be prepared from the abstract, then the proviso should be stated as fully as it ought to be introduced into a correct recital of any one of the deeds to be so prepared.

Other special agreements should be abstracted under the like regulations; and so much of the clause as can materially affect the title should appear on the abstract.

In detailing the duty of the conveyancer, the general rules of law applicable to these points will be considered.

### *Of Powers.*

In regard to powers, the course to be observed must be dictated by circumstances.

Powers which have been exercised, or which are to be exercised, with a view to complete the title, should be [\*150] given almost *verbatim* from the deeds, will, &c. as far as the powers are material to the title.

They should show at least the following circumstances, as far as such circumstances exist, and are expressed in the power;

1st, The person or persons by whom the power is to be exercised.

2dly, The mode of exercising the power, as by deed, will, &c. and the circumstances which are to attend such execution, as the attestation, &c.

3dly, The time at which the power is to be exercised, if any time be prescribed.

4thly, The consent or request, &c. which are essential to a valid

execution of the power ; and the mode in which such consent, request, &c. are to be expressed ; as by deed, &c. to be attested by two witnesses, &c.

5thly, The act authorized by the power, as to sell, exchange, &c. together with the circumstances connected with the mode of executing the power, as to exchange for lands of equal or greater value, or for lands in a given county, or for lands of a given tenure, as freehold, copyhold, leasehold, or the like.

6thly, The person or persons in whose favour the power is to be exercised, as children, or a particular child ; or objects of a given description, as children living at the death, &c. ; and the estate which may be appointed to them, if any particular estate [\*151] is mentioned in the power ; \*also whether the power is to be executed revocably or irrevocably, or the like.

And if any particular application of the money be directed, and there is not any provision for indemnifying a purchaser or mortgagee from seeing to the application of his money, the clause which directs the application should be stated fully ; that it may appear that the money has been duly applied in the manner in which the same was applicable.

Such powers as are barred, or released, or extinguished, or become incapable of taking effect ; or if they are in their nature immaterial to the title ; as powers of leasing, &c. need not to be stated at large.

It is sufficient that there be a notice that such a power was contained in the settlement, in these or the like terms, *with power to A B to jointure on a second wife ; or, with the usual power to sell and exchange and make partition ; or, with a power to raise portions for younger children of a second marriage, or the like.*

When to a power there is annexed an indemnity to purchasers paying the money, and the power has been exercised, the clause which enables the trustees to give receipts for the purchase money should be added, and, as a general rule, the clauses which contain the direction for the application of the money should be omitted.

It frequently happens, that a settlement, or other deed [\*152] of trust, contains a power to change \*trustees, or to add new trustees. When this power has been acted on, and the title is, or is to be, derived through or under the new trustees, and acts done by these trustees, the material parts of the power should be disclosed by the abstract. In other cases it is sufficient that there should be a short reference to powers of this nature.

### *Of Covenants.*

IN abstracts of title to leases, all burthensome covenants which may affect the purchaser at law, or in equity, should be stated in the abstract.

But in abstracts of deeds concerning the inheritance, there should be a general reference to the covenants in this form, "*With the*

*usual covenants for title ;*" or with usual covenants for seisin in fee ; good right to convey ; peaceable enjoyment ; free from encumbrances ; and further assurance.

Sometimes the covenants are expressed still more fully, by showing the extent of the covenant, and consequently introducing the clause '*notwithstanding,*' &c.

That part of the covenant which deserves most attention is, the *exception*, if any, *against encumbrances* ; such exceptions as often as there are any, and the encumbrances there noticed, as far as they are material to the title, should be stated in the words of the covenant ; or at least *\*so fully as to show the nature* [\*153] and extent of these encumbrances.

Outstanding terms also, noticed in the exception, should be expressed in this part of the abstract ; but briefly or fully, according to the circumstances of the case.

If there be not any other information concerning a term, the abstract should adopt the words of exception. But if the term, and all circumstances belonging to it, have been previously noticed, then the reference to it may be short ; except in those cases in which the evidence of the title to the term appears different in the exception from the state of the evidence in the former part of the abstract ; for instance, if by the former deeds it appears that the term was vested in *A*, but by the exception it appears to be vested in *B* ; this circumstance, together with the mode, (if it appear,) by which the title has been thus varied, should be particularly expressed in this clause of the abstract.

Also, as often as a *covenant for the production of title deeds* discloses any evidence of the title not contained in a former part of the abstract, it becomes material, and should be noticed.

The mischief and inconvenience arising from such covenants, and the disclosure they afford, and the notice they give of dormant encumbrances, afford abundant reason for the modern practice of taking such covenant in one or more *séparate deeds*.

*\*Of the Execution, &c.*

[\*154]

At the foot of the abstract of every deed, it should be noticed by whom the deed has been executed, or that it has been executed by all the parties, or by all of them excepting certain persons, naming them.

And if the deed was executed, in exercise of any power which required a particular mode of execution, it should appear from this part of the abstract that this mode of execution was observed ; for example, if the deed be required to be signed, sealed, and delivered, it should appear to be signed, sealed, and delivered ; and if any given number of witnesses were required to attest the execution, it should be noticed that the deed is attested by this number of witnesses, as far at least as respects the persons as to whom such attestation was rendered necessary.

And if there be a defect in the mode of execution or attestation, sufficient should be stated to raise the question on this defect, that it may be considered whether the want of the prescribed mode of execution or attestation affects the validity of the title at law or in equity.

Of course the memorandum which refers to the execution and attestation should be more or less particular and circumstantial, as the nature of the case may dictate.

Except in particular cases no more is requisite than a [\*155] clause to this effect : ‘*executed by \*A B and C D, and duly attested ;*’ or, ‘*executed by all parties, and duly attested.*’ And if circumstances should require, as they frequently do, that the execution, at a time different from the date, should be shown, then the time of execution should be stated ; more especially if the attestation contain, as it ought to do, a specification of the time of execution. For instance, a lease under a power may be good, as a lease in possession, if it be executed after the date : while it would be void if executed on the day of the date.

So a will may be operative on the legal estate, because the will was published after the execution of the conveyance ; although the publication took place after the day on which the deed is dated.

Also, at the foot of the abstract of deeds, in which the purchase money is paid under a special power or direction ; and even at the foot of the abstracts of deeds, (especially those of a modern date,) from a seller to a purchaser, it should appear that a *receipt* has been given by the person to whom the money is expressed to have been paid, and signed by the persons by whom the same ought to have been signed. Since, in the contemplation of a court of equity, the receipt is the material discharge for the purchase money ; and, except in the instances already noticed, the want of a receipt is implied notice that the purchase money remains unpaid ; and [\*156] that there is, till the contrary be \*shown, a subsisting lien in the vendor for the purchase money.

Also, when part of the money secured by a mortgage appears, by a receipt indorsed on the mortgage, to have been paid off, this fact should be noticed in this part of the abstract.

Also, when a deed requires *enrolment*, livery of *seisin*, a memorial, as in cases of grants of annuities for a life or lives, or for years determinable on a life or lives, or other external act to give it validity, the fact of enrolment, livery of seisin, memorial, &c. and the time when it took place, should be stated.

Sometimes a feoffment, or a lease for a life or lives, requiring livery of seisin, may be good, because livery was made after the time limited for the commencement of the grant ; while the instrument would be void, as limiting an estate of freehold *in futuro*, in case livery had been made at the period of the date of the deed of feoffment, or of lease.

In cases of this sort the evidence of the time of livery, &c. should be added.

Also, if a deed has been cancelled, the fact should be noticed ; and yet the law is now settled to be, that neither an actual or a voluntary cancellation of a deed will restore the estate to the former proprietor. There must be an assignment or surrender of the term, if a term passed ; or a reconveyance of the estate of freehold in case an estate of freehold was conveyed.

\*So if a deed has, since its execution, been altered by [\*157] erasure or interlineation, that circumstance should be noticed. Fraudulent alteration by the grantee would vitiate the deed. It was formerly ruled, that an alteration by a stranger, in a *material* part, would also vitiate the deed. It is now agreed, that no alteration by a stranger will avoid the deed ; but it may be given in evidence, as far as its contents appear ; and extraneous evidence will be admitted, to show the language in those parts which were altered. The old rule is applicable only when, from the want of evidence, or the uncertainty arising out of the evidence, the contents of the deed, as they stood before alteration, cannot be ascertained.

Also, if there be any explanatory agreement in a memorandum, made on the deed before the execution, such agreement should be added to, and form part of, the abstract, and inserted prior to the notice of the execution.

And, as to lands in register counties, viz. Middlesex, and *East, West, and North* Ridings of York, it should be shown that the deed has been registered, and in what book and page the registry is to be found.

As a point of curiosity, rather than utility, it may be noticed, that if an illiterate man, a man who cannot read, require, at the time of his execution of the deed, that the deed should be read to him ; and the deed is read fraudulently, \*as having other [\*158] contents than it really has, the deed may be avoided by a plea of that fact.

#### *Of Fines, Recoveries, &c.*

IN abstracting a fine there should be stated the term of which it is levied, the names of the conusors, the names of the conusees, the parcels, as far as they are material, and the names of the townships and parishes, as far as they are applicable to the lands in question.

And when a fine is levied to bar an entail, or to strengthen a title by nonclaim, it should be stated that the fine was with proclamations ; and, in strict propriety, it should be shown in what terms, and on what days, the proclamations were made, that an opinion may be formed whether the proclamations were duly made.

And in abstracting common recoveries there should be shown the term in which the recovery was suffered, the names of the demandant, the tenant, the vouches, including the common vouchee, and the order of voucher, namely, that the first vouchee vouched the common vouchee, or any other mode of voucher : the parcels

which are comprised in the recovery, and the names of the townships and parishes, as far as they are material to the lands in question ; and the time at which the writ of seisin was returnable, and seisin delivered.

[\*159] The observation recommending an *\*alphabetical* arrangement of the names of townships, parishes, &c. applies, with great propriety, to fines and recoveries.

The general object of fines and recoveries, it should be remembered, is,

1st, To convey the estates of freehold or inheritance of married women.

2dly, With proclamations to operate by estoppel.

The peculiar operation of a fine is to gain a title by nonclaim, or to bar heirs in tail.

The peculiar operation of a common recovery is to bar reversions, and remainders expectant on an estate tail, and conditions and collateral limitations annexed to that estate.

And as a fine cannot bar by nonclaim, nor can bar heirs in tail, unless the fine be with proclamations, there is a manifest propriety in showing that the fine was with proclamations, when the fine could not have accomplished its object, unless it had been proclaimed.

Also, as a common recovery will not bar either the estate tail, or ulterior or collateral interests, unless there be a voucher over by the owner under the entail, it is proper to state that there was a voucher of the common vouchee.

The practice, if it does not promote any other advantage, preserves a remembrance of principle, and this alone is an object.

Besides, it is too much to rely on the apology generally made, for the omission ; to state that a fine was with proclamations, or that there was *\*in recovery* a voucher of the common vouchee, namely, that all fines are proclaimed, and that in all recoveries there is a voucher of the common vouchee. It is generally, only, and not universally, true, that fines are proclaimed, and that there is in recoveries a voucher of the common vouchee.

Let it be observed also, that a fine to bar by nonclaim must be levied by or to a person who has an estate of freehold either in possession, reversion, or remainder, under a title adverse to the rightful owner ; and that a common recovery suffered to bar an entail, must be suffered by or against a tenant who has the immediate freehold ; and that a common recovery will not bind the entail, or the remainders over, &c. unless it be suffered by the owner of the entail as vouchee ; except in the single instance of his being the tenant of the estate tail in possession intended to be barred, and his being in that case named as tenant to the writ of entry, and vouching as such tenant.

*Of Acts of Parliament.*

Acts of parliament are to be considered as private conveyances. They differ however from private conveyances in the circumstance, that the title does not altogether and always depend on the *ownership of the parties*, and the nature and extent of their interest. Frequently it depends on the extent and operation of the words of the act, qualified or restrained, as they \*may be, [\*161] and generally are, by provisos and exceptions, introduced into the act.

Few titles are more perplexed than those which depend on allotments under inclosure acts, and an observation to that effect has already been made. The leading feature of inclosure bills, acts for partition, exchange, &c. must be understood to be, to make the lands which are received upon allotment, exchange, partition, &c. subject to the same estates and uses as the lands, &c. in respect of which the allotment, exchange, &c. were made.

In general, by force of a provision in inclosure acts, the allotted and exchanged lands pass by a will made prior to allotment, as a substitution for, or in addition to, the lands given by the will; but no provision for that purpose is contained in the general inclosure act.

The local act therefore must be inspected, to see that it contains such provision.

The difference also between exchanges under inclosure acts, and exchanges under acts for that special purpose, are to be noticed.

Under inclosure acts the exchange will be absolute; communicating positively to the lands received in exchange, the title which governed the lands given in exchange; while in exchanges under acts for that special purpose, the eviction clause is generally framed in the same manner as if the exchange were made by mutual grants between the parties; or would have been implied by law on a formal exchange.

\*The singularity attending the construction of acts of [\*162] inclosure, and of exchanges of land for land, &c. or common rights for land, under these inclosure acts, may be thus stated:

*There is a change of land, &c. but not a change of title.*

The title which *A* has to his lands, or common rights, at the time of allotment or exchange, is communicated to the land he receives under the allotments or exchanges; while under a mere private act of exchange between individuals, each holds the lands under the title which attached to these lands prior to the exchange. He may therefore be evicted, though the title to the lands he gave in exchange may be perfectly good.

His remedy on eviction is, in this case, to resort to the lands he gave in exchange. But then, as under a common law exchange, the whole exchange, and not a rateable part, must be defeated.

And for a long time, say sixty years, after the exchange, he must, for the satisfaction of a purchaser, make out the evidence of title, as well to the lands given in exchange, as to those he holds under the exchange.

Each of these considerations is one of considerable difficulty, and frequently of great anxiety and expense.

In abstracting acts of parliament the clauses to be principally regarded, are,

[\*163] 1st, *The date*, or rather time of passing the \*act, viz: in old acts of parliament the year of the reign in which the act was passed, and in modern acts, which have that fact, the day on which the act received the royal assent. This date is now added to the title, under the provisions of an act of parliament passed for the purpose in the last reign.

2dly, *The title of the act*.

3dly, The recitals of the act, as far as they can throw any light on the state of the title, or lead to the construction of the enacting clauses.

4thly, The enacting clauses ; and if the act be by way of power, it should show all the circumstances of the power, in like manner as is recommended under the head "powers;" and when it vests the estate, discharged of uses, &c. the clause should be abstracted, so as to show the lands which are the subject of the act, as far as it is material to the title in question ; the persons in whom the legal estate is vested ; the duration of the estate limited to them ; the time from which the estate is to be vested ; the uses, &c. from which the lands are discharged ; the trusts which are to be performed, as to sell and exchange, &c. ; the provision, if any, to indemnify the purchasers from seeing to the application of their money ; and when there is not any such provision, or the title depends on the ulterior trusts, then the ulterior trusts, and the mode in which the money is to be applied.

[\*164] To these particulars should be added the \**exception*, or *saving clause*, so as to show whose rights are preserved, and consequently as against whom parliament has left the rights open.

In general, indeed almost universally, the sole object of an estate bill is to leave the title exactly as it stood under the ownership of the testator or settler, so only as to liberate it from certain uses which he has declared, and to pave the way for a new or more convenient settlement, by selling part of the lands to exonerate others, or by selling certain parts of the lands with a view to the purchase of others more convenient, or to authorize partitions, exchanges, and the like.

Inclosure acts are seldom abstracted. The person who prepares the abstract contents himself with stating, that in pursuance of an act passed, &c., intituled, &c., *A B* and *C D*, two of the commissioners appointed by the said act, allotted to *E F* all, &c. in lieu of, &c., here stating the lands in lieu of which the allotments were made.



This practice has arisen from the circumstance, that all inclosure bills are, in their provisions, nearly the same.

And now the statute of 41 Geo. 3, cap. 109, has, in effect, incorporated into every inclosure bill various provisions; being the ordinary regulations which were usually introduced into old inclosure acts.

On the one hand, not to delay the reader, and on the other hand, to afford him a ready \*access to the provisions of this [\*165] act, an abstract of the act will be added in the *Appendix*.

Of course, when these provisions are varied by the local or particular act, the variations should be shown; and if that act contained any special matter which can affect the title, these special provisions should be stated; and the person by whom the abstract is examined, on behalf of the purchaser, should take especial care to see that the award is warranted by the provisions of the act; that it is duly made and enrolled, &c. as the act requires; and in particular, within the time, if any, limited by the act.

It should seem that the enrolment must be on parchment, 1 Inst. 35 b, 36 a, 2 Inst. 673.

In those parts of the abstract which are subsequent to the inclosure acts, the parcels must be abstracted in such terms as will show that the lands received in allotment are comprehended in the conveyances, assignments of attendant terms, and other instruments.

In inclosure acts, it is a common provision to enable tenants for lives, husbands seised in right of their wives, and other persons having partial interests, to make mortgages by demise, with the consent of the commissioners, for defraying the expenses of the inclosure; and it will appear in the Appendix that the general act has a similar provision. The effect of this provision is to make the term so created the prior term in the title, and consequently the term which governs the right to the possession, and to maintain \*ejectment, &c. For this reason, in the subsequent de-[\*166] duction of the title, more than ordinary care should be taken, that the assignments of the residue of this term have been regular in point of form, and by persons duly qualified.

The title, under a term thus created, forms an exception to the rule, *qui prior est tempore, potior est jure*; and also to the rule which makes the title under derivative estates, and the order in which they are to confer the right to the possession, depend on the estate of the person by whom the derivative estate is granted.

The solution is, that the grant is by way of power under the authority of the act.

Something of the same nature, though in a more limited degree, takes place when terms are created under powers in settlements, and the terms over-reach and defeat estates limited by the settlements.

These examples are in semblance, though, when well understood, are not in fact, exceptions to another rule viz. *qui non habet ille non*

*dat*, or, as it is variously expressed, *nemo potest plus juris in alium transferre quam ipse habet*.

Leases under powers in conveyances, wills, &c. merely confer the right to the possession, as against all persons claiming under the same settlement, &c. without taking precedence or priority over estates of freehold, attendant terms, and other interests, which were in point of estate, anterior to the estate of the settler, or other author of the power.

[\*167] \*Cases of this sort should always receive particular attention, because they are most likely to deceive those best acquainted with the general rules of property.

### *As to Commissions of Bankrupt.*

Also, when a title depends on bankruptcy, the commission of bankrupt should be abstracted, or should appear in the recital of a bargain and sale from the commissioners to the assignees.

The material circumstances are,

The date of the commission :

The names of the commissioners, with the clause of *quorum*, a clause seldom added ; so that it may be considered, whether the authority given to the commissioners has been duly exercised.

In abstracting the bargain and sale, the proceedings are for the most part recited, so as to show,

The commission ;

The trading ;

The petitioning creditor's debt ;

The act of bankruptcy ;

The declaration of the commissioners finding the party a bankrupt, and the time, if any, be stated of the act of bankruptcy ;

The choice of assignees.

And then the deed states,

[\*168] The bargain and sale from the commissioners \*to the assignees, in trust for themselves and the other creditors of the bankrupt.

To these particulars should be added, by way of memorandum, either at the foot of the abstract of this deed, or as part of the title of the deed, that the bargain and sale has been enrolled ; and regularly the time of the enrolment should be expressed, since, as to freehold and copyhold lands, no estate passes till enrolment.

And the enrolment must be within six *lunar* months, to bar estates-tail, and remainders and reversions expectant on such estates.

While a bargain and sale by the commissioners of bankrupt operates only from the time of enrolment, other bargains and sales operate either in fact, or by relation, from the time of their execution.

It will be proper to consider the bankrupt laws somewhat more at large.

1st, The relation of the title of the assignees under a commission of bankrupt, is, generally speaking, to the time at which the act of bankrupt was committed ; and therefore, if a man commit an act of

bankrupt, and afterwards marry, or sell, the dower of the wife, or title of the purchaser, will be defeated; so if he marry, and then commit an act of bankruptcy, and is declared a bankrupt, and afterwards, and before a bargain and sale is executed, he dies, and then a bargain and sale is executed, the title of the assignees will prevail over the title \*of a woman claiming freebench, on the [\*169] ground that by relation, her husband was not tenant at his death.

For the protection of purchasers, two acts of parliament have been passed. By the statute of 21 James I. c. 19, s. 14, it was provided, "That no purchase for good and valuable consideration should be impeached, by virtue of any act made against bankrupts, unless the commission to prove him or her a bankrupt should be sued forth against such bankrupt within five years after he or she should become a bankrupt." And by the statute of 46 Geo. III. c. 135, s. 1, commonly called Sir Samuel Romilly's act, it was also provided, that in all cases of commissions of bankrupt thereafter to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made or entered into more than *two calendar* months before the date of such commission, should, notwithstanding any prior act of bankruptcy committed by such bankrupt be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt had not, at the time of such conveyance, &c. any notice of any prior act of bankruptcy, by such bankrupt committed, or that he was insolvent, or had stopped payment.

But these statutes, as is evident from their \*language, [\*170] merely afford a protection to *bonâ fide* purchasers; and the qualifications annexed to these acts, render it extremely difficult to advise a purchaser to accept the title of any trader who is in failing circumstances.

Notice of an act of bankruptcy, or even of insolvency, deprives the purchaser of the protection of the latter act. And a commission of bankruptcy within five years, deprives him even of the protection of the former act; and a commission of bankrupt within two calendar months deprives him of the benefit of the latter act. There is this material difference between the former and the latter act; the former act gives protection by a lapse of five years to a *bonâ fide* purchaser for a valuable consideration: so that after five years, unless there be a commission of bankrupt in the mean time, the purchaser acquires a secure title; but under the latter act, he is not, even after two calendar months, discharged from the risk of a subsequent commission of bankrupt, unless he be a purchaser without notice of an act of bankruptcy, or of insolvency.

2dly, Respecting the property which may pass by a bargain and sale under a commission of bankrupt.

1st, It extends to real and personal estates, offices, &c. powers of appointment, &c. right to the benefit of equities of redemption,

conditions, &c. and it even extends to rights of action ; thus assignees, under a commission of bankrupt, may maintain a [\*171] writ of entry sur \*abatement, and consequently any other real action, *Smith v. Coffin*, 2 Hen. Black. Rep. 444.

And the commissioners have power even to bargain and sell lands acquired after the commission, so as they are acquired before the bankrupt is certificated. But for after-purchased lands there must be a bargain and sale subsequent to the commencement of the title of the bankrupt. The bargain and sale may also operate on estates for years, for life, in tail, or in fee. Terms for years more commonly pass by the assignment of the goods and chattels ; and as part of them, without any specific words. It was formerly supposed, on the construction of the statute of 13 Eliz. c. 7, § 2, that a term for years would not pass from commissioners of bankrupt without a bargain and sale indented and enrolled. The note in the 12 Mod. 3, under the name of *Danby v. King*, assumed it to be a settled point, that an indenture and enrolment were essential to make a title under a term of years, from commissioners of bankrupt ; but it is now understood to be quite clear that enrolment is not necessary.

3dly, Estates for life, in tail, or in fee, cannot pass to the assignees, without a deed indented and enrolled ; and as commissioners have an authority only, and not an estate, no estate will vest under the bargain and sale until enrolment.

With respect to estates for life, and in fee, no time for the [\*172] enrolment is prescribed ; but it \*is likely to be decided that the enrolment must take place in *the life time* of the assignees, or of one of them. And it is material, that till the assignees have an estate under a deed indented and enrolled, they cannot communicate a legal title to a purchaser.

In regard to estates-tail, the seisin passes under a deed indented and enrolled ; but the estate-tail or remainder will not be barred, unless the bargain and sale be enrolled within six lunar months. The right to bar estates-tail and remainders, depends on the statute of 21 James I, c. 19, § 12. The enactments are, “ That the commissioners, or the greater number of them, shall have power by deed indented and enrolled, within six months after the making thereof, in some of his Majesty’s courts of record at Westminster, to grant, bargain, sell, and convey, any manors, lands, tenements, or hereditaments, whereof any bankrupt is or shall be in any way seized of any estate in tail, in possession, reversion or remainder, and whereof no reversion or remainder is or shall be in the crown, of the gift of the king, &c. to any person or persons for the relief of the creditors, &c. ; and that all and every such grants, bargains, sales, and conveyances, shall be good and available in the law to such person or persons, and their heirs, against the said bankrupts, and against all and every the issues of the body of  
 [\*173] \*such bankrupts, and against all and every person and  
 \*persons claiming any estate, right, title, or interest, by,  
 from, or under the said bankrupts, after such time as such

"person shall become bankrupt, and against all and every other person and persons whatsoever, whom the said bankrupt, by common recovery, or other ways or means, might cut off or debar from any remainder, reversion, rent, profit, title, or possibility, into or out of any the said manors, lands, tenements or hereditaments."

The principle established by this act, is, that a bargain and sale from the commissioners of a bankrupt tenant in tail shall have the same effect as any rightful assurance proceeding from the bankrupt would have had.

Thus when he is tenant in tail in possession, and might have suffered a common recovery, the bargain and sale will have the effect of a common recovery, and will bar the estate-tail, and all remainders and reversions, &c. expectant on the estate-tail.

So when he is tenant for life, with a remote remainder in tail, and consequently, as having the freehold, and also an estate-tail, he might by a common recovery have enlarged his estate-tail into a fee simple, by barring the estate-tail, and all remainders expectant on that estate: a bargain and sale from the commissioners, duly enrolled, will have the like effect.

But when the bankrupt has an estate-tail in \*remainder [\*174] expectant on an estate of freehold in some other person, then, as the power of the bankrupt was merely to levy a fine with proclamations, and bar his estate-tail, a bargain and sale from the commissioners will have only the like operation. If the bankrupt had obtained the freehold prior to the bargain and sale, then the power of the commissioners would be commensurate with the power of the bankrupt, and the bargain and sale would operate as a common recovery, instead of operating as a fine with proclamations.

On this statute several difficulties arise, and the points must be considered as doubtful until they shall have been decided.

1st, Suppose the bankrupt to be tenant in tail in remainder expectant on an estate of freehold, and the commissioners to execute a bargain and sale, while the bankrupt is tenant in tail in remainder, this bargain and sale will operate only as a fine.

At a future period, the bankrupt or his issue may be qualified to suffer a common recovery; a doubt then arises, whether a subsequent bargain and sale by the commissioners will produce the same effect as a common recovery by the bankrupt or his issue would have produced. Under these circumstances, the practice is to require a common recovery from the bankrupt and his issue; for it is not clear that the commissioners, who have merely an authority, and \*have once executed that authority, can, by [\*175] a second bargain and sale, produce any effect on the title.

In another case, *A* was tenant for life, remainder to *B* his son in tail; they were partners, and became bankrupts, and a joint commission of bankrupt was issued against them, and a bargain and sale was made by the commissioners to the assignees; and it was contended, that as the father and son together might have suffered a

common recovery, the bargain and sale from the commissioners should have the like effect as a common recovery. Against this operation it was objected, that the statute of James I. merely adverted to the power of each bankrupt individually ; and that the bargain and sale had not any other effect on either estate than if it had been confined to that estate ; and that the rule *juncta juveni* did not apply. The case is now under discussion, and to be decided by the chancellor. *Jarvis v. Taylor*, 3 Barn. & Ald. 557.

In all these instances it is clear beyond all doubt, that a common recovery suffered by the bankrupt, or by the issue in tail, with the concurrence of the freeholder, would have the same effect in barring the estate-tail and remainders, as it would have had in case there had not been any bankruptcy.

It is also to be remembered, that commissioners have merely an authority, and not any estate. With respect therefore to copyhold lands on which heavy fines of admission are payable, [\*176] the \*prudent course is to except the copyhold lands out of the commissioners bargain and sale, and to execute a bargain and sale in the first instance, in favour of the purchaser, when a sale shall have been made.

A bargain and sale to the assignees would lead to their admission and payment of a fine, and another fine be payable on the admission of the purchaser. By making a bargain and sale immediately to the purchaser, one fine would be saved, and this saving is frequently an object.

All powers which are for the benefit of the bankrupt, and are an interest in him, may be exercised by the commissioners ; but they have not any power over estates of which the bankrupt is a mere trustee ; nor can they execute powers which are in the nature of mere naked authorities, to be exercised for the benefit of some third person, as powers of selection, authorities to sell, &c. ; and it is the generally received opinion, that the commissioners cannot execute a power which is limited to be exercised by the bankrupt and his wife jointly, or by the bankrupt and any other person jointly ; for instance, if lands are limited to such uses as the bankrupt and his wife should jointly appoint, and in default of appointment to the bankrupt for his life, with remainder to his wife for life, with remainder to their children as they shall appoint, with remainder to their children in strict settlement, as tenants in tail, with remainder or reversion in fee to the bankrupt ; the commissioners [\*177] may, by \*their bargain and sale, confer a title to the estate for life, and to the remainder in fee, but they cannot execute the first power, because that power was not exercisable by the bankrupt alone ; and they cannot exercise the second power, because that power was a mere authority, and not an interest.

For the purpose of protecting the interest of the wife, it seems, on a first view, reasonable that the power of the husband and wife should not be suspended as to the estate for life and estate in fee, by reason of the bargain and sale of those estates.

But on mature consideration, it will appear to be the more sound conclusion ; the conclusion most consistent with the principles of law ; that the bankruptcy is an alienation by the bankrupt, and, to the extent of his estate for life and the ultimate fee, is a negative on his right to exercise or join in exercising the power, to the prejudice of this alienation ; so that the power remains in operation on that part only of the fee simple which is not occupied by the estate for life, and the ultimate remainder in fee ; in short, the bankrupt is precluded from assisting in any act through the medium of the power which would defeat the alienation through the act of bankruptcy. See *Goodright v. Cator*, 2 Douglas 477.

This observation, negating the right to exercise powers after bankruptcy, must be \*confined to powers conferring [\*178] an interest, as distinguished from powers being mere authorities.

Sometimes a title depends on a choice of new assignees. Such new assignees must be appointed under an order of the chancellor sitting in bankruptcy ; and it is not sufficient that there should be an order of removal and an appointment of new assignees ; but there must be a bargain and sale, or a conveyance by lease and release, to carry on the title to the legal estate as in ordinary cases. *Blaxham* and others, *assignees of Ward v. Hubbard*, 5 East 407.

By the same case it was decided that the acts requiring registration of bills of sale of ships do not extend to assignments by operation of law, as assignments by commissioners of bankrupt.

On the transfer to be made on the choice of new assignees in the place of some only of the assignees, it is proper to frame the conveyance so as to make the new assignees and the continuing assignees jointenants. An inaccuracy in this respect would not invalidate the title. A conveyance from those who are assignees, *de jure*, with a conveyance of the estate from the persons, whoever they may be, in whom the legal estate is vested, would render the title complete.

### *Of Wills.*

In abstracting wills the following particulars should receive attention :

\*1st, *The date* : and the date should be taken from the [\*179] will, and not, as is sometimes done by mistake, from the letters of probate.

2dly, Any charge imposed for the payment of debts, legacies, or annuities, should be shown ; and such annuities, and, in most cases, the legacies, should be enumerated.

Also if debts are scheduled or specified, they should be disclosed by the abstract ; but when there is a trust for payment of debts and legacies, and the debts are not specified or scheduled, and it does not appear that all the debts have been paid, there does not

exist any reason for stating the legacies specially, since the purchaser is not under any obligation to see that they are paid.

But when it appears, either by a recital, by a report of a master in chancery, or from any other authentic document, that all the debts have been paid, and some of the legacies are known to be unpaid ; it seems, from practice, to be the opinion of the profession, that the purchaser is bound to see to the application of his money in the payment of legacies.

Also if the debts become *specified or scheduled* by the act of any of the parties interested in the estate, or by the report or decree of a court of equity, and they have not been satisfied in the mode prescribed by the court, nor has the money been applied under the direction of the court, then there exists a necessity of treating these debts as scheduled or specified debts, and \*they should be stated, inasmuch as the purchaser is bound to see to the application of his money.

*Annuities*, though for some purposes considered as legacies, are, in regard to the subject now under consideration, treated as specific charges ; as gifts of a particular interest in the land ; so that the rule respecting the charge of debts, generally exempting the purchaser from seeing to the application of his money in the payment of debts or legacies, does not extend to annuities.

In *other particulars*, the rules prescribed, as proper to be observed in abstracting deeds, ought to be observed in abstracting wills, except that a will is, in general, from the ignorance of those by whom it is penned, a more irregular instrument.

The points most material for attention are to show to whom the lands are devised ; the words used in description of the lands ; the words of limitation by which the estate is devised ; the words of modification, or of severance of the tenancy, if there be any ; the words of qualification which may abridge or defeat the estate ; the uses and trusts, if any are created ; the conditions, or conditional limitations by way of executory devise, or otherwise, annexed to the devise or appointment ; the charges imposed on the devisee ; the indemnity, if any, against seeing to the application of the purchase-money, or mortgage-money ; such powers, [\*181] if any, as \*are material to the title : and when leasehold lands are the subject of the title, the appointment of executors. And in abstracting each of these clauses, there should be a close adherence to the language of the will, so that a correct opinion may be formed of its construction : and the context should always appear, as far as it may, in any manner, influence the construction, by explaining, enlarging, abridging, or in any other manner affecting the genuine import of the words on which the title more immediately depends. And it is more proper to be diffuse in giving the language of a will, especially one not prepared in technical language, than to attempt to reduce the abstract into a narrower compass, and thus withholding information which may be material.



Indeed, in abstracting wills, it is, from the inaccuracy with which they are frequently prepared, and the want of the regular form which is observed in deeds, of the first importance to add all limitations over, and all clauses which can affect the context, or vary the construction.

How often does it happen, that in wills, words which import an estate in fee simple are, by subsequent expressions, and especially by words of limitation over, qualified into an estate tail, or into a fee determinable by executory devise. And again, words which under the *rule in Shelley's case* import to create an estate tail, are, from other expressions in the will, expounded to give the property to the heir or heirs of the body as purchasers.

\*Variations of this sort are almost infinite. Hence the [\*182] importance that every clause which can influence the construction should be abstracted. In numerous instances, the opinions which counsel give on an abstract are very different from the opinions they would have given on a perusal of a full copy or extract of the will.

At the foot of every will it is proper to show at what time the testator departed this life ; the court in which the will was proved, and the time of the probate, as a means, in some degree, of ascertaining the time of death ; and if the lands are in a register county, then the fact, and the time of registration, should be added.

It rarely happens that the time of the death of the testator is stated. This is material in many cases for the purpose of showing at what time the title of the devisee commenced.

This fact, however, is of less importance when the will is proved shortly after the death of the testator, or before any act is done, or conveyance made, to occasion any material change in the ownership.

As to real estate, the probate of the will is given, partly that the inference may be drawn, that the testator was dead before a given time, and partly to direct to the court in which a search may be made for the will ; in case the attorney for the purchaser should think fit to search for the will.

But as to leasehold estates, the probate of the will is of importance, as a step in the title, \*since no one can be the [\*183] executor of an executor, unless the will has been proved by the first executor, and was proved by him in the proper court : though an executor may assign or surrender before probate, yet to prove that he was executor, the will must be proved either by the executor, or by some other person. See Peake's Evidence and references. Nor can any one be an administrator *de bonis non* of the first testator, otherwise than by taking letters of administration from the same court in which the will was proved ; nor then unless the will was proved in the proper court ; with a difference, however, that such administration may be void or avoidable according to the circumstances.

Also, if there be a confirmation of the will by the heir at law, or  
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any conveyance taken from him, or any proceeding had against him to establish the will, or any interest be left undisposed of, which descends to the heir at law ; in all these cases it is material to state who was the heir at law of the testator at his death ; and when the circumstances of the case require it, there should be a deduction of the title from heir to heir, or from heir to devisee, and, in some cases, from heir to executor, as for example, where the land is converted into money (*quoad the heir,*) as where the heir takes a lapsed legacy, or part of a residue, as lapsed, or undisposed of, or the residue of trust-moneys by resulting trust.

[\*184] Also, when any devisee, either in fee, or of a \*particular estate, dies in the life-time of the testator, the fact should be stated.

Also, when a will is partially or wholly revoked, or revoked *pro tanto* in equity, the deeds, &c. which are the cause of revocation, should be stated ; and it is most correct to state the deeds, wills, &c. in the order of their date, and not, as is too frequently the case, according to the order of the times at which they respectively operate ; thus placing the deeds which operate in the life-time of the testator, prior to the will whose operation is suspended till his death.

Also, when the fact warrants it, it is usual to state that the testator died without having altered or revoked his will ; or without having altered or revoked the same as far as relates to the lands in question ; or except as to some particular legacy, or particular lands.

*Codicils*, &c. which revoke a will, should be given according to the order of their dates ; and if they vary the state of the title, they should be stated as separate and independent instruments.

Also, when a codicil *republishes* a will, the date of the republication should be added ; and it is more proper to add it as a separate and independent fact, according to the order of its date, than by a memorandum at the foot of the will.

Also, when a will is proved in the court of chancery *per testes*, that fact should either be noticed generally, as when that [\*185] was the sole \*object of the suit ; or it should be noticed in abstracting the decree of the court, when that decree may be material to the title on some other account.

Also, as to wills and codicils referrible to the title of real estates, it should be stated either in the introductory part, or at the foot, of the abstract of these instruments, that the same were executed not only in the presence of, but were also *attested by*, three witnesses.

### *Of Probates.*

At the foot of every will it should be shown in what court, and by whom, the will was proved, and also the date of the letters of probate ; and when a person claims as the executor of an executor,

or the executor of a surviving executor, it should be shown that the will was proved by such first executor or surviving executor; and the representation should be carried on by showing probate of the will of the only executor, or the surviving executor, in each gradation of the succession. And when the executor, or surviving executor, dies intestate, there should be an abstract of letters of administration *de bonis non*, of the first testator.

To make out a representation by an executorship to a surviving executor, the fact of his survivorship should be shown by certificates of burial of his co-executors before his death.

\*But unless the title has been varied by intermediate [\*186] acts, it does not seem to be necessary to show the letters of administration obtained by each successive administrator.

Mistakes are sometimes made in deducing the title under letters of probate, when there are several executors. It is common for one or more of the executors to renounce the probate, and then the other executors prove, and die in the life-time of the disclaiming executors. In this instance, the disclaiming executors must either prove the will, as they may do, or they must renounce the probate, and if they renounce the probate, administration *de bonis non* must be granted.

These observations are dictated by a consideration of the following points ;

1st, No one becomes, till probate in a court of competent jurisdiction, complete executor for transmitting the succession; and consequently, unless he has proved the will, his executor will not be the executor of the first testator; but there must be an administration generally, unless some executor proved; and if any executor proved, then letters of administration *de bonis non*.

2dly, A renunciation by all of several executors will make an absolute intestacy; and letters of administration, with the will annexed, must be granted. If there be several executors, and all prove, the executor of the surviving executor will become the executor of the first testator; \*with this exception; [\*187] before the probate of the will of his own testator, not afterwards, he may disclaim to be the executor of the first testator.

If there be several executors, and some renounce, and some prove, those who have renounced must, in the event of their being the survivors, prove the will, or renounce; and till they have renounced, letters of administration, with the will annexed, cannot be granted with effect.

If the representation is to be carried on by executorship, it must be shown that the executor was appointed by the survivor of the several executors, including those who renounced, as well as those who proved; and if the surviving executor proved the will, then the gradation is, *A* and *B*, executors of *C*, who proved the will of *D*, and was the *only* executor, or the *survivor of the executors* named in

his will ; and so on progressively through the whole line of succession from executor to executor.

The letters of probate, if they state the fact, are considered in practice, as evidence of the fact. Even in courts of justice they are full evidence of the facts they state ; but if the facts are mistated, or can be controverted, a purchaser might make such mistake a ground of objection to the title.

Letters of probate, &c. do not form any essential part of a title to real estate derived under an authority to executors to sell.

[\*186]

*\*Of Administrations.*

WHEN the personal representation to deceased persons is material, as it is in all cases respecting chattels real or personal charges, and the person died, either originally or eventually intestate, the letters of administration of his effects should be abstracted. They may be general or special, and they should be abstracted accordingly. They should show the date of the letters of administration ; by whom they were obtained ; out of what court, namely, a court of competent jurisdiction ; and the subject of the administration, as, all the goods, chattels, and credits generally, or all the goods, chattels, and credits of *A*, left unadministered by *B* ; or the goods, chattels, and credits of *A*, as far as relates to a particular term for years.

*Of Decrees, &c.*

WHEN decrees are material to the title they should be abstracted. Sometimes it is even convenient to abstract the bill on which the decree is founded, so far as it states the facts of the case, and the material parts of the prayer of the bill.

Sometimes also it is very proper to state some material fact from the answer, as the state of the pedigree, &c. as disclosed by the answer, or some question raised by the defendants.

[\*189]

The decree itself should be stated so far only \*as it materially affects the title, as, by declaring the will of real estate duly proved, or the trusts thereof to be performed ; decreeing a redemption ; a foreclosure, or a partition ; or directing a sale in performance of trusts ; or a mortgage to be made ; or portions to be raised ; or compelling the defendant to elect ; ordering an account to be taken ; new trustees to be appointed, and the former trustees to be discharged ; and to execute conveyances, &c. &c.

And as often as there is a direction for the application of the money, the mode in which the money is to be applied under the decree should appear on the abstract.

To the decree should be added the report of the master, ascertaining any fact under a reference to him ; the purchase at a sale before the master ; the price offered ; the allowance of the master ; and the confirmation by the court of the report ; exceptions to the title ; and the order made on arguing the exceptions.

So, when the accounts are material, to show the amount of an encumbrance, or the like, the report of the master, ascertaining the state of the account, and the balance, and the order confirming the report, should appear on the abstract.

In all cases of reports, it should be shown, that the report was confirmed by order of the court, or over-ruled on exceptions. And such interlocutory orders of the court as direct the \*application of the money, are particularly proper to be [\*190] abstracted.

And whenever money is paid into court, and it is incumbent to see that it has been so applied, and there is not any subsequent order which recognises the payment, the fact of payment should be stated from an office-copy of the accountant-general's certificate.

In short, whatever may elucidate the title, and show the rights or interests of the parties, their encumbrances, and the extent of them, are properly introduced into the abstract, from the proceedings in chancery; and the more recent the proceedings in chancery, the more important it is that their substance, and the material parts, should be given in such manner that their effect and influence on the title may be fully comprehended.

### *Of Judgments, &c.*

WHEN judgments affect the title, or are assigned, and kept on foot to protect the title, they should be noticed on the abstract; and to the judgments, when assigned, should be added the assignment and declaration of trusts.

It rarely happens that the solicitor for a seller discloses, by the abstract, judgments obtained against his client, or any of his ancestors, or testators, or former proprietors.

When they are known, or when there is not \*any out- [\*191] standing estate by which the purchaser can be protected from them, under the circumstance that he is a purchaser for a valuable consideration, and without notice, it is the duty of the vendor's solicitor to furnish the purchaser with an abstract of the judgments.

It is to be remembered, that judgments are charges by way of *lien* in equity from the time at which they are recorded; and at law from the time at which they are docketed; and from that time, or, which last happens, from the time of ownership in the defendant the lien attaches. And as judgments obtained prior to the commencement of ownership, affect the seisin when acquired, the search for judgments should sometimes be extended beyond the commencement of the ownership.

The general rule is to search for judgments for ten years; and if any judgment appear within that time, to search for ten years from the time of the more early judgment; and in like manner for ten years from each judgment, which shall be found; stopping, in all cases, at the period when the owner became adult, unless there be reason to suspect there are judgments against him while a minor.

The result of a judgment is sometimes an execution by *elegit* as to freehold lands, and an execution and sale as to leasehold lands. Under the execution by *elegit* there arises an estate, in the nature of a chattel interest, to continue until the debt shall [\*192] be paid; and under an \*execution and sale of a term of years, a title will be conferred for the residue of the term.

Of these subjects, a more enlarged view will be taken in a subsequent part of this work.

It is also the duty of the solicitor for the purchaser, except in the cases which will be noticed in the sequel of these observations, to search for judgments, and to satisfy himself that there are not any judgments (except those which are disclosed to him,) which can affect the title.

Of the same description are recognizances, statutes merchant, and of the staple, debts of record, and debts to the crown, by bond or recognizance.

In register counties the search should be of the register for encumbrances, by judgments, recognizances, and the like. As to lands in other counties, it is the practice to search the warrant-of-attorney-office for judgments in the common pleas, and the judgment-office for judgments in the king's bench; and in the exchequer-office of pleas for judgments in the exchequer; and the seal-office for statutes merchant, &c. in chancery; and with the clerk of the staple, in those cities and towns which have a staple.

By the statute of 4 and 5 William and Mary, c. 20, it was intended to protect purchasers from judgments, unless they were docketed in the mode prescribed by that statute.

It was the object of the several register acts, to produce the same benefit in point of security to purchasers of lands in counties [\*193] having a \*register. And at law no judgment is binding on a purchaser unless it be docketed; and as to lands in register counties, unless the judgment be registered. But as these judgments, &c. are valid against the defendant, whether they are registered or not, or whether they are docketed or not, they are treated by courts of equity as encumbrances against every purchaser who can be affected, by notice before the completion of his purchase, of the lien subsisting under the judgment, &c. See *Davis v. the Earl of Strathmoer*, 16 Ves. 419.

#### *Crown Debts.*

By the common law, every debt to the crown on record becomes, from the time at which the debtor is indebted by record, a lien on his real estate, with a relation to the time at which the debt appears on record. The statute of 33 Hen. VIII. c. 39, § 2, extended the lien of the crown to debts to the king by *bond*, or other specialty; but as to leasehold estates, a sale before the test of the writ of execution will be good against the crown. See Sir Gerard Fleetwood's case,

8 Rep. 91; but an attendant term, though assigned in trust for the purchaser, will not protect against a debt to the crown.

By the statute law, the crown has been armed with several privileges for better securing its debts; and the law on this subject is very \*material to titles. It is necessary only in this [\*194] place to state, that in all cases in which a vendor, or a former owner is likely to be, or to have been, indebted to the crown, there should be a search for crown debts. It often happens, that as *sureties*, persons are indebted or bound to the crown on whom suspicion would not readily alight.

Lands of receivers of the crown, being immediate accountants to the crown, (see 13 Eliz. c. 4,) become, by *virtue of their office*, and from the time of their appointment to the office, and not merely from the time of their becoming indebted, liable to a lien of the crown; so that sales by such receivers, before they become indebted, may be defeated by debts subsequently contracted. Acts of parliament are sometimes found necessary to relieve a title from all lien of the crown on account of these receivers.

*Of the Circumstances which should be stated in explanation of the Abstract.*

It has already been observed, that explanations of this sort are generally introduced into the recitals of a subsequent deed, and are to be collected from them. And though these recitals do not keep up the chain of the title, as regularly as if the circumstances of the title were stated in the order of their dates, as separate and independent facts; yet when these facts appear in the recital of a deed of a distant \*date, and these facts have been acted [\*195] on, or acquiesced in, they are, in a high degree, satisfactory, since they remove all doubt concerning the existence of the fact, or its accuracy. With a view, however, to connect the title, and to preserve a regular chain of its evidence, it seems preferable to give the facts, in the order of their date, or by way of explanation of the facts, &c. to which they relate; and it may be averred that these facts appear in the recitals of a certain indenture, bearing date, &c.

In considering the different parts of the abstract, notice has been taken of several circumstances proper to be noticed by way of explanation. To these should be added whatever fact may materially vary the state of the title, or show that it has been regularly deduced;

Of this description are,

1st, The death of *A*, who was tenant for life.

2dly, The death and failure of issue of *A*, who was tenant in tail.

3dly, The return of *C* from Rome, when his estate is to determine, or the estate of another person is to commence on that event. And as often as the time at which the event takes place is material, as it frequently is, with a view to the operation of a common reco-

very, suffered by a person whose estate commences in possession, by the determination of a prior particular \*estate ; or the right of a person taking as heir, devisee, or executor, &c. to make a conveyance or will, levy a fine, suffer a recovery, &c. ; whether dower or curtesy has attached ; or a merger has taken place ; or a contingent remainder has been destroyed ; the time of the determination of the particular estate, or the death of the ancestor, testator, &c. should be expressed.

Also, to show the application of settlements, wills, &c. in regard to the persons for whom provision is thereby made, the number of the issue, &c. should be mentioned ; so that it may appear what were the interests to which they became entitled under the settlement, will, &c. ; and if their shares or interests have been varied by death, &c. the events which have caused this variation should be noticed.

The facts also of survivorship of two or more persons, taking as joint-tenants, either as trustees, or beneficially, or as executors, &c. or of one of several persons taking under a limitation to the survivor of several persons, (being the object in whom an estate given to a class of persons vested,) is a proper subject to be expressed in the abstract.

In short, every circumstance which may afford any light on the state of the title, or to account for the deduction of the same, ought to appear as part of the history of the title. And on many occasions it is proper that the facts which depend on extraneous circumstances should be authenticated by certificates of baptism, [\*197] \*burial, marriage, and the like ; or by the affidavits of persons to whom facts are known, which do not admit of being verified in any other mode ; as identity of persons, and of parcels, possession, seisin, &c. &c.

Also, in complicated titles, depending on a deduction by descent from a remote ancestor, there should be a pedigree of the family, as the only means of rendering the state of the title clear and perspicuous. And when the title is derived under a remote remainder or reversion, which was devisable by each successive owner, the time of the birth and death of each person who for the time being was the heir at law, should be stated, as far as it can be ascertained.

Sometimes also, in the abstract of the deed, or will itself, it is useful, and of great assistance to the person by whom the abstract is to be perused, and to whom the state of the family cannot otherwise be familiar, to aver the fact, that the contingency did or did not happen, in this or the like form, viz. " In an event which did not happen, namely, in case *A* should die in the life-time of *B*, then, &c. ;" or, " In an event which did happen, namely, in case *B* should die in the life-time of *A*, &c."

During the continuance of particular estates which are determined, various acts may have taken place which cease to have any effect after the determination of these estates. The rule is, *cessante statu primitivo, cessat derivativus*.



\*As a general proposition, the conveyances of particular [\*198] tenants whose estates are determined may be disregarded and omitted out of the abstract. But there are many instances in which these acts may have an influence on the title to the inheritance; and so far they are to be added to and form part of the abstract. For example, *A* is tenant for life, with remainder to *B*, in tail; *A* assigns to *C*. Suppose *A* and *B*, or *A* and *C*, to suffer a recovery after such assignment, the assignment should be stated; in the former of these cases, that the defect in the recovery may appear; and, in the latter instance, the assignment should be stated, to show the competency of *C* to assist *B* in suffering a valid recovery.

So *A* may, by feoffment, or fine or recovery, have divested the remainder or reversion; or a tenant in tail may have discontinued the inheritance; each of these acts may materially influence the title to the inheritance; and under these and all other like circumstances, the acts of *A* should appear on the abstract as constituting part of the evidence of title to the inheritance, even after the determination of the estate of *A*.

Experience proves that a great number of titles are defective, from the circumstance, that a recovery has been suffered, with the assistance of a person as tenant for life, after he had aliened his estate for life by way of mortgage, or as a security for an annuity; and \*consequently, after he who remained the ap- [\*199] parent owner no longer had the right to assist in suffering the recovery.

These are the leading observations to be regarded in preparing abstracts of title; and these observations, with others which will readily suggest themselves, as the circumstances may dictate, will direct the attention of the gentleman by whom it is to be compared, on the behalf of the purchaser, to take the necessary caution in seeing that the abstract is complete, and in supplying any defects or omissions.

It is more particularly the duty of the solicitor of a purchaser, embracing under this term a mortgagee, to see that no fact is stated on light foundation, or without being warranted by some authentic or reasonable evidence.

It is also his business to take care that, though the abstract be correct, as far as it is stated, no provisions are omitted which may materially vary the state of the title; and for this purpose, it is his duty, first, to peruse the abstract; and secondly, to peruse the deed or will from which the abstract is prepared. This is a tedious business, and it is too frequently committed to the care of persons who have not sufficient interest to discharge their duty with care, or sufficient information to perform it with judgment.

In general, every deed, &c. should be read by one person, in comparison with the abstract \*held by another person; [\*200] or the abstract should be read to the person who is perusing the deed, &c.

The practice in preparing abstracts seems to have taken a turn  
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by no means favourable to the interest of purchasers. The professional emoluments arise from preparing the abstract, and not from examining it. It is now prepared by the solicitor for the seller. Formerly it was prepared by the solicitor for the purchaser ; and this, as far as the point of accuracy is in question, is the more eligible mode, since the deeds were left with the purchaser's solicitor, and they were abstracted at leisure, and he had sufficient time to take care that all the material parts were inserted in the abstract.

It is to be feared that now, in some instances at least, sufficient time is not allowed, or if allowed, cannot be devoted by the solicitor for the purchaser to read over and compare the voluminous deeds constituting the evidence of a title, which has experienced a frequent change of ownership, or been fettered by various encumbrances. To understand one deed thoroughly, and all its various operations, combined as they may be with numerous external circumstances, will sometimes engage the attention of those most skilled in the subject, for the greater portion of a day, and require frequent recurrence to the subject before the contents can be perfectly comprehended. What then can be expected from a person who [\*201] is at once \*to wade through deeds, wills, &c. which run to the length of several hundred skins, and a short abstract of which alone comprises from fifty to a hundred pages.

It is a subject of surprise that more inaccuracies do not occur ; and that more defects than are experienced in titles do not exist. Did clients know the care and attention devoted to their concerns, in the progress of a faithful discharge of duty, in the completion of any transaction of difficulty, connected with a title to real property, they would be more sensible, than they seem to be, of the value of the assistance of those whom they employ.

The points to which the solicitor for the purchaser should also attend with particular care, are, to see that the will, if any, appears to be duly attested ; and that the deed is executed by the persons named in the abstract, as executing the same ; and that the execution by them is duly attested according to the general rules of law, unless a particular mode be required ; and then in the mode required ; or is attested in the mode noticed in the abstract ; and that the receipt, if any is indorsed for the consideration money, is duly signed ; and that the deed, if professed to be enrolled, was duly enrolled ; and finally, that the deed was on the *proper stamps* : a head of investigation which now requires great accuracy, and a minute knowledge of the stamp-laws.

[\*202]      \* *Of Abstracts of Title to Copyhold Lands.*

HITHERTO the observations which have been made have been more immediately applied to lands of freehold tenure ; but the general rules are equally applicable to lands of copyhold tenure.

The deduction, however, of the title to copyhold lands generally

depends on a customary mode of conveyance, and of admittance by the lord.

These customary conveyances are,

1st, Surrenders to the use of a purchaser, or surrenders to particular uses, or surrenders to the use of a will, &c. and a will made pursuant thereto, and the admittance thereupon.

In general a copyholder cannot transfer his estate by a common-law conveyance, but such common-law conveyance, except in the instance of a lease warranted by the custom of the manor, or a lease for one year, which, unless restrained by custom, is warranted by the rules of the common law, will be a forfeiture of the copyhold tenement. But there are several instances which may be considered as exceptions to the general rule, and in which a common-law conveyance will operate with effect; thus, one of several joint-tenants may release to the other; so a person having a mere right, or an inchoate interest as a \*contingent remainder, [\*203] may release to the copyhold tenant, or may release to the lord.

2dly, An authority to sell, created by a will under a surrender to the use of that will, may be executed by a sale made by a deed, and the bargainee will be entitled to be admitted.

3dly, Under the statutes relating to bankrupts, and other special acts of parliament, as the land-tax acts, a bargain and sale enrolled may be the only efficient mode of transferring the copyhold estate. These observations are applicable only to alienations of the legal estate; for the equitable owner of a copyhold interest not being tenant in tail, or a married woman, may bind his or her interest by any deed or contract.

It is observable also, that entails of copyhold lands, whether they affect the legal or the equitable ownership, may be barred in the mode prescribed by the custom. They may be barred by a surrender, and even a surrender to the use of a will, unless some other mode, as a customary recovery, or the like, be rendered necessary by the particular custom of the manor.

It is also to be noticed (though the contrary is to be found in Mr. *Watkins's* valuable book on copyholds) that there cannot be any entail of the equitable ownership except in those cases in which the legal ownership of the same lands might be entailed. See *Pullen v. Middleton*, 9 Mod. 494.

Every abstract relating to copyhold lands \*should show [\*204] the date of each surrender and admittance, the person by whom the surrender was made, the admittance, or the grants by the lord upon forfeitures, &c. and, either by special words, or by reference, the lands which are surrendered, or to which admittance is granted. It should also show the admittances of the heir as such; and the proceedings which are had under customary recoveries, to bar legal or equitable entails; and also all special covenants and agreements, even in deeds and other instruments, which may materially affect the equitable title; also the surrenders made

to the use of wills, and whether they are made to the use of the will generally or specially, as to the use of the will made or to be made.

It should also state the wills (if any) made in pursuance of such surrender, and when the lands of copyhold tenure are specifically devised under circumstances which will entitle a court of equity to supply the want of a surrender, as in favour of a *child*, a *wife*, or a *creditor*, for it will not supply the want of a surrender in favour of a grandchild, a husband, or a stranger, except so far as he is a creditor, or may raise a question of election, by imposing on the customary heir the obligation in equity of either giving effect to the disposition, or waving in favour of the disappointed devisee, the lands which are devised to the heir, such will, &c. should be abstracted.

Also inclosure acts, which substitute allotments of land [\*205] in lieu of lands formerly of \*copyhold tenure, are with propriety introduced into the abstract.

When freehold and copyhold lands are intermixed, or constitute part of the same farm, or are sold together to the same person, the abstract generally shows, in the first place, the state of the title to the freehold lands, with the covenants, &c. which affect the equitable title to the copyhold lands; and the legal title to the copyhold lands is given in a distinct abstract, so as to disclose the transactions which have taken place in the copyhold court.

When copyhold lands are enfranchised, and the copyhold tenure becomes extinct in the freehold tenure, the evidence of the title should, to be complete, show the state of the title under the copyhold tenure, and also the state of the title under the freehold tenure; for the copyhold tenure exists in point of right for the benefit of all persons who can make title to the same, or show any encumbrance under this tenure. And as the copyhold tenure is extinguished, the freehold tenure governs the right to the possession; and the judgments, &c. and other encumbrances of the owner of the freehold tenure may be considered as affecting the actual possession, as far as it is discharged of the copyhold tenure. In this respect there is a great affinity between the learning of merger, by which one estate is absorbed in another, and *extinguishment*, by which one tenure is annihilated in the other.

[\*206] In the observations to be made on the state \*of the title, as falling within the province of the conveyancer, the different modes which have been adopted to guard against the total annihilation of the copyhold tenure, so as to prejudice the title by accelerating the encumbrances of the owner of the freehold tenure, or by blending one title with the other, will be considered.

It frequently also happens that different copyhold lands are parcel of different manors; in this case there should be a distinct abstract of the title to the copyhold lands held under each distinct manor; as being the most convenient arrangement that can be made for simplifying the evidence of title.

This, however, is so universally the practice, that any caution on the subject may appear altogether unnecessary.

*As to Lands of the Tenure of ancient Domesne.*

VERY few observations are material to be offered on this head, as the general rule for preparing abstracts of lands held in common socage tenure are equally applicable to lands of the tenure of ancient demesne, except that it would be proper to notice any acts which have been done by the tenant, with or without the consent of the lord, to render these lands frankfree, viz. common socage tenure; and also whether the acts so done remain in force, or have been avoided, as they may be, by a writ of deceit, when the lord is not bound by these acts.

\*The abstract, when it concerns lands and tenements [\*207] of the tenure of ancient demesne, ought to state that fact in the head or title of the abstract, because a fine cannot, at least without an express custom, (Jenk. Cent. 87. Dyer 373,) be levied of lands in ancient demesne to bar an estate-tail, *Hunt v. Bourne*, 1 Salk. 339.

It may be frequently necessary, either in judging of a title, or in advising on the means of completing it, to treat a fine as ineffectual, while it would be a sufficient assurance if the lands had not been of the tenure of ancient demesne.

The principal object of introducing this head into this place, is merely that those points shall be raised by the abstract, which ought to be considered, and will be suggested by the observations to be made on this subject.

*Of the Points to which attention is to be paid in considering the Abstract, and advising on the state of the Title.*

THIS part of the subject includes more immediately the duty of the conveyancer or counsel.

The object, in every abstract of title, should be to show the precise state of ownership of the persons by whom the sale or mortgage is to be made.

It ought to disclose the history of the title, \*and all material circumstances attending the same, and the charges and encumbrances by which the title is affected. [\*208]

This will more particularly appear in the observations which have been suggested on the proper form of the abstract, and on the particulars to which attention is to be paid in preparing the abstract.

It is the duty of the conveyancer to consider the deduction of the title; the evidence by which it is supported; the defects, if any, which appear in the title, or in its evidence; and to call for such information as shall appear necessary to elucidate the real state of the facts; and also for such documents as, in the nature of the case, may exist, although no notice, or only very slight notice, be taken of them in preparing the abstract.

This may appear to be a duty attended with little or no difficulty ; but it will be found to involve within its compass the knowledge of all the rules of real property, and all the niceties with which these rules abound.

In short, no one ought to deem himself qualified to advise on the state of a title till he has informed himself fully on the doctrine of the law concerning estates, their quantities, as in fee, in tail, &c. &c. ; their qualities, as jointenancy, &c. ; the degrees of ownership they confer, as the right of tenant in tail to bar reversions, and remainders, as well as the heirs in tail ; the incidents to [\*209] which estates are liable, as dower curtesy, &c. ; \*the modes by which they may be conveyed, determined, forfeited, or extinguished ; the modes by which a title may be changed from one person to another, either by conveyance, (namely, deed or will,) by the act of law, as *descent*, &c. or by the tortious or wrongful act of a stranger, as *disseisin*, or of a particular tenant, as *wrongful alienation* by tenant for life, or *discontinuance* by tenant in tail.

He must also be prepared to distinguish with accuracy between legal and equitable estates ; the different modes by which these estates arise or are transferred ; and the distinctions which are allowed in application of the law to one species of interest and the other.

As a general proposition, it is in vain that he should first read his abstract, and afterwards, except on special points, endeavour to inform himself of the law. In this mode very little progress could be made in the despatch of business ; his abstract might remain in his hands for a period which would exhaust the patience of his client. It is not, by this observation, intended to insist that a conveyancer should be expected to solve every difficulty which may arise, without any recourse to his books.

All that is intended to be expressed is, that he should be prepared to see the difficulty, to raise the question in his mind, and to refer to the authorities by which that difficulty shall be solved, as far as it admits of solution, or at least to show that the point [\*210] admits of so much \*doubt that it does not allow of a decisive opinion.

In short, no case, except one of extraordinary difficulty, ought to arrest his career in perusing the abstract ; combining its different circumstances ; deciding in his own mind on the operation of each deed as it is perused ; and comprehending its influence on the state of the title, or at least the doubt to which it exposes the title.

This degree of skill is to be attained only by an enlarged and extensive course of reading ; by digesting, and preparing to apply, the bulk of the laws on real property, and in particular those which concern the *ability* and *capacity*, and, in the result, the disability of persons, as infants, married women, &c., and of the respective owners of different estates, as tenants in tail, &c., the effect of conveyances by them respectively, and the course of transmission or succession on the descent, or devolution of the estate.

The rules for the exposition of deeds and wills, as the technical means by which they are to be construed, and their effect ascertained, are also to be studied with particular care.

It is frequently necessary, first, to decide whether a person be tenant in tail, tenant for life, or in fee; whether he be a joint-tenant, or tenant in common, or tenant by entireties; whether he has a vested or contingent remainder, or an interest by executory devise; whether \*he has a legal or an equitable [\*211] estate; whether he has an estate, or power, or an authority; before any safe or satisfactory conclusion can be drawn on the subsequent parts of the title.

Frequently, also, it is necessary to consider whether a person has an estate, or merely a right or title of entry, or of action; consequently, whether he is seised, or has been disseised; also, whether an estate which was vested has been divested; and whether an estate which existed, has been discontinued, or turned into a right of entry; whether a seisin which has been converted into a right or title, has been restored by entry, by action, or by that operation of the law which is called remitter.

Also, whether a particular estate which existed has been determined by the lapse of time, or by filling the boundary by which it was circumscribed, or measure of time which it was to complete. Also, whether it has been determined by surrender, merger, or entry for a forfeiture; and whether an interest, limited by way of contingent remainder, has been destroyed, released or extinguished; and whether a more remote remainder or reversion has been barred under the ownership, which the law confers on the person who has a prior estate; being a learning peculiar to estates-tail.

This summary will disclose to the reader that a large field of inquiry is open to his research, and invites his studies, and that some portion of labour is necessary to enable him to qualify \*himself to perform his duty with credit to himself, [\*212] or with justice to his client.

There was a period when, in some particulars, this duty was attended with more difficulties than at present; while on the other hand, the increase, in modern times, of law-books, and, in particular, of Reports, has added to the difficulties, by enlarging the field of the student.

The assistance to be derived from several of the publications of the last thirty years will not only abridge the labour of the student, but enable him, with reasonable certainty, to attain that correct knowledge of the subject which, without those aids, he could not have obtained, at least, in the same space of time, nor with the same degree of certainty; for without any imputation on his judgment, he might have adopted many of those errors which are unavoidable on the part of a person who is studying the law, without any assistance, and without the aid of methodical treatises; and also without any means of discarding those propositions which were

formerly considered as law, but have been over-ruled, explained, or modified by modern decisions.

The heads of the law to which particular attention is to be paid, are those which will be found in the Commentaries of *Blackstone*, in the four last chapters of the first volume, the several chapters of the second volume, the 1st, 2d, 10th, 11th, & 27th chapters [\*213] of the third volume, \*and the 29th chapter of the fourth volume of that excellent work. The student should take these chapters as a great outline, and fill up that outline by reading the different treatises written on the different subjects of some of these chapters, particularly *Fearne* on Contingent Remainders and Executory Devises; *Butler's* notes on Coke upon Littleton; *Cruise* on Fines and Recoveries; *Watkins* on Copyholds and Descents; *Gilbert's* Tenures; *Powell* on Devises, Powers, Mortgages, and Contracts; *Bacon*, *Saunders*, and *Cruise* on Uses; *Sugden's* Vendors and Purchasers; *Sugden* on Powers; the Law of Evidence (than which no subject is more useful to the conveyancer;) *Beeth* on Real Actions; so much of *Comyns's* Digest as relates to these actions; and finally, the different heads on the different subjects of real property, which are to be found in *Comyns's* Digest; *Sheppard's* Abridgment; *Bacon's* Abridgment; and *Finer's* Abridgment.

Nor should the student be without *Sheppard's* Touchstone, a book which of itself is a comprehensive library of the law on the Assurances of Property, given in clear and perspicuous terms, with comparatively few errors; a work excellent for its method and arrangement; and those heads of law which are not embraced in the Touchstone may be supplied from *Sheppard's* Abridgment.

In short, a person intimately acquainted with the contents [\*214] of *Sheppard's* Touchstone, and who \*has made himself perfectly master of the same, may, with the assistance of some of the modern treatises, congratulate himself on having attained a very large portion of that knowledge which will be useful to him in the exercise of his professional duties.

In *Sheppard's* Touchstone, the chapter on the Exposition of Deeds, the chapter on Grants, and the chapter on Testaments, are particularly deserving of his attention, as containing those rules of construction, without which it is in vain to attempt to go through an abstract of any length, or of any difficulty, with a chance of success.

The rules of law-construction and exposition which are collected in the different books of maxims, and also in *Wood's* Conveyancing, will be found particularly useful. As a manual, a little book, entitled, "*Principia Legis et Equitatis*," (by *T. Branch*, esq.) contains more law, and more useful matter, than any one book of the same size which can be put into the hands of the student. Mr. *Barton's* Elements will also be found an useful part of the law-library of a conveyancer. The student, however, will do right to use these, and other works of the like nature, as a species of index, and only



as assisting him in his studies. He will always trace the law to its fountain head by reading the Reports and the Text-books, or other authorities from which deductions are drawn. Thus he may satisfy himself that these deductions are correct before \*he implicitly relies on them. Any work which is calculated to abridge the labour of the student, by bringing the points under each head into one view, and under an arrangement calculated to enable the student to find that of which he is in search, with the least possible delay and loss of time, is of more value than can be easily conceived by any persons, except those who from practical experience have learned its importance.

The observations on the extent of study necessary to qualify the conveyancing lawyer, are not made for the purpose of damping the ardour of the student, or to overwhelm him with the magnitude, or the difficulty, of the pursuit.

They are suggested merely to point out the extent to which his researches are to be carried.

In proportion, however, to the exertions which are made will be the satisfaction to be derived, and the fruits to be reaped, from these exertions.

It is obvious, that it will require several years to complete a course of reading which shall embrace all the subjects to which reference is made; and to comprehend and apply the learning involved by these subjects in a scientific manner.

As it happens, however, to a few only to have their time fully occupied by the duties of the profession, in active practice, at the commencement of their career, the young conveyancer has generally sufficient leisure to form his \*opinions correctly [\*216] before they will be called into extensive use. And, in proportion as his business shall increase, he will, by the assistance of experience, feel qualified to acquit himself with credit, should the interval be diligently employed; and at first he will be able, from his abundant leisure, to supply in a great measure, any want of more extensive knowledge, by minute attention, by reflection, and by inquiry among more experienced men; so as to avoid any flagrant errors.

Still, however, a considerable portion of knowledge should be acquired before any attempt be made prior to the commencement of actual practice; since an important error committed in the early part of life is not easily forgotten. Besides, irreparable injury may be done to those who have relied on such assistance, and committed their whole fortune, and sometimes confided the pledge of their future industry, to his judgment.

The great object of the student should be to employ his time in the most beneficial manner; and at first to confine himself to those points which may be of more immediate use to him; and to leave abstruse learning, and those heads of the law which are nearly obsolete, and which serve rather for illustration than actual use.

till an occasion of practice or leisure may invite his attention to them.

There is one point, however, to which a person thus circumstanced should pay particular \*attention. In the early part of his professional career he should consider it not only as his duty, but as his interest, when a question arises in actual practice, which involves any head of learning on which he has not fully informed himself, to consider this as the proper time, as far as his leisure will admit, to study the subject fully, and pursue it through all its distinctions.

By these means his opinions given on the particular case will, in all probability, be correct ; at all events, respectable ; and he will have an opportunity, should he wish it, of at least treating the subject in a masterly manner ; and (this is a point of still more importance to himself, with a view to his future success,) he will be better prepared to advise on the same subject, when it shall again be presented for his consideration.

With a view to this mode of study, modern treatises are of inestimable value, as containing the recent and ancient authorities on the subject brought into contrast ; also accurate criticisms ; and pointing out those distinctions by which cases apparently differing in principle are to be reconciled.

As aids in the same pursuit, the Digest of Chief Baron *Comyns*, and the Abridgment of *Bacon*, will be of considerable use ; but lastly, and finally, the student should always make a point to go to the fountain head, by consulting those authorities which he has discovered in the progress of his studies, and which appear [\*218] to be \*more immediately applicable to the case on which he is to advise ; for it is a truth ! a lamentable truth ! that few books in the law are so precise as to be positively correct.

After pursuing this course, a gentleman must have mistaken his talents, and the line of profession in which his exertions may be judiciously employed, or he will be competent to all the duties of his profession.

All knowledge should be founded on principle ; and from first principles, and general rules, the student should descend to particular cases, and to exceptions.

The student should be particularly careful to select his general rules and first principles from the most approved authorities. He should take care also, (and this can be done only by extensive study, and close application,) to collect the technical sense of these rules ; and to understand them, not according to the literal terms, but according to the sense in which they are received by eminent lawyers. He should also be careful not to adopt the opinions of counsel as used in argument, any further than they shall appear to be warranted by the authorities to which the counsel refer, or the principles which they state. In short, he must not take any thing upon trust. He must examine every proposition

with care, before he suffers it to influence his mind, or to become the rule of his professional conduct.

It is a misfortune which attends the study of \*the law, [\*219] that few propositions admit of mathematical demonstration; and definitions, and legal propositions are expressed, for the most part, in such vague and indefinite terms, or with so little attention to positive accuracy, that a long time must elapse before the student will be prepared to understand many of the best writers in the sense in which they must be comprehended, to render their propositions correct in law.

In a regular course of reading, the student should, either in his own mind, or by an actual arrangement, analyze the different legal definitions, should show their application, the sense in which they are understood, the exceptions of which they admit, and the distinctions which arise out of modern determinations.

The mode of doing this is pointed out by *Fabyan Phillips*, in his little book on the study of the law; and it will be found an useful exercise for the purpose of information and of study.

Even to commit to paper, in different language, the substance of that which has been read, with the distinctions which present themselves, and the doubts which are suggested in the mind, will also tend greatly to improvement. And in reading the Reports on any particular case it would be useful, by a marginal note, to extract, and set down in writing, the precise point of the decision, and the different resolutions to which the court came in forming their judgment.

\*The great object with those students who wish to [\*220] qualify themselves in a short time, to enter into actual practice, is to consider by what means they may with the greatest ease, and at the most early period, attain that portion of knowledge which will justify them in taking on themselves the active duties, and the responsibility, great as it is, of the profession.

There are scarcely any two persons who will agree on the precise mode of study which may be pursued with most advantage.

The opinion formed on the subject by the author, from extensive experience and observation, is, that a person thus circumstanced, should, in the first place, acquire a knowledge of the general heads of the law, their divisions and subdivisions. For this purpose, the Analysis of *Blackstone* and of Lord *Hale* are of incomparable value.

The next point is to fill up this outline, and to dwell with more than ordinary care on those heads which are most useful. This course should lead the student to consider the nature of property, as divided into real and personal estate; and also the division of real property into corporeal and incorporeal hereditaments. On this subject the chapter of *Blackstone's Com.* vol. 2, c. 2, 3, and the notes of Mr. *Powell*, in his edition of *Wood*, will be of great value.

Mr. *Barton* has also collected all the principal points on this

subject; but it is not by any means necessary that the student should, for the present, enter into all the detailed learning [\*221] which \*concerns the nature of incorporeal hereditaments.

It is sufficient for his purpose fully to comprehend the different natures of the different property; the sense in which the words real and personal estate are used; the substantial differences between lands, tenements, and hereditaments; in other words, corporeal, or incorporeal hereditaments, so that he may be prepared to understand the application of the rules of law which are founded on the distinct nature of the different properties.

In this place, also, it may be right to acquire a general knowledge of the doctrine of courts of equity, which, through the medium of trusts, consider lands as converted into money, and money as converted into land, for the benefit of certain persons claiming under a trust declared by the owner of the fund.

On this subject, a chapter in Mr. *Barton's Elements* may be read with great advantage.

The doctrine of Tenures will, perhaps, be supposed to fall next in order for consideration.

It is an interesting subject; illustrates the laws of real property; and renders the study of the doctrine, as it respects the nature and incidents of estates, more scientific. But to the practical conveyancer it is of less value than has generally been supposed; and it may be investigated with more advantage, and with more convenience, after the student has obtained a complete knowledge of the nature and qualities of estates, and \*the [\*222] modes by which they may be conveyed, transferred, &c.

The next subject to which the student should direct his attention is the difference between estates; as they are of freehold, and not of freehold; as they are of inheritance, and not of inheritance.

The doctrine respecting the freehold is of such infinite importance to the conveyancer; so many cases are referrible to this learning; it so materially affects the qualities and incidents of estates, the modes by which they are to be recovered, transmitted and conveyed; the effects of some assurances, as fines and recoveries; and the incidents of estates, as dower, curtesy; and the nature and denomination of the injuries to estates, as disseisin, abatement, intrusion, and discontinuance, that too much attention cannot well be bestowed on this subject; and therefore it is worth the labour to enter fully into this learning; especially as it may be read without any great exertion of the mind, and understood after a few hours, or to the utmost a few days, close investigation.

For want of any other digested or connected arrangement of the subject, reference is necessarily made to the chapter on Freeholds in the *Essay on the Quantity of Estates*.

In studying this subject the student should not be content with reading the chapter to which he is referred. He should [\*223] examine the \*authorities which are quoted; and this will

not be a waste of time. These authorities are not only relevant to the particular head, but lead him, slightly, at least, to consider other subjects which will occupy his attention in the progress of his studies, and will become useful in opening to his mind the reason of the law, and the policy of our system of tenures.

The subject which next deserves the attention of the student is the quantity of estates; the duration of the interests they confer; the assurances by which they may be created, limited, or transferred, and the words which are necessary to the creation or the limitation of these estates.

On this subject the student should dwell with particular attention, and make himself completely master of the several heads; since, in every moment of his professional life, he must have recourse to this learning, and apply it to practice.

On this subject he should read the first part of the text of Littleton, and commentary of Coke; paying attention more particularly to those parts which are selected in *Hawkins's* Abridgment of Coke upon Littleton; since he has selected the parts most material to a modern lawyer.

And the general principles and leading cases on these subjects will be found in *Preston's Essay on the Quantity of Estates*.

Should the student have occasion to extend his researches on this subject, he must consult *\*Bacon's* [\*224] Abridgment, under the heads Estates and Legacies, and *Comyns's* Digest, and *Viner's* Abridgment, under the same titles. To these he may add *Mr. Cruise's* Digest.

Though this may appear at first to be a subject which would require a long course of reading; yet with close application, and with a mind zealous to understand this branch of the law, and carrying in full remembrance the general rules collected in the *Essay on the Quantity of Estates*; it will be found that if the subject be methodically studied, it may be thoroughly understood in a much shorter time than can be easily imagined; and in pursuing this study there would, at the same time, be acquired, a large portion of useful knowledge; in short, the great difficulty of studying the law before it was reduced into a methodical arrangement will, in effect, have been surmounted.

The next head of the law to which attention may be paid is that which concerns the *qualities of estates*, as they are vested or contingent, in possession, reversion, or remainder, executed or executory.

These heads of the law are fully treated of in *Blackstone's* Com. vol. 2, ch. 11, and *Bacon's* Abridgment, chap. Remainders; and *Mr. Fearn's* incomparable Treatise on Contingent Remainders and Executory Devises.

As preparatory aids in this study, may be read, with some advantage, that part of the introductory chapter in the *Essay on the Quantity of \*Estates* which treats of this subject. Also [\*225]

the tract on the difference between estates which are executed and executory, and the succinct view of the rule in *Shelley's* case.

As books of reference for particular cases, recourse must also be had to the Abridgment of *Bacon* and *Viner*, and the Digest of *Comyns*.

Having made this progress, the student will find that he has acquired a large portion of useful knowledge. He will begin to comprehend the nature of our system of tenures, the reasons on which they depend, and their connection, as part of an excellent system of laws founded on principle, and not depending merely on, or flowing from, arbitrary decision.

In this course of reading he will necessarily have his attention frequently drawn to the nature and qualities of estates, as held in severalty, in jointenancy, in coparsenary, in common, and by entireties; and as he might fall into important errors if he were not to make himself acquainted with the precise nature of these qualities, and the consequences which flow from them, he should now study this branch of the law with particular care.

On this head he should read the several chapters of *Blackstone* on the nature of these tenancies: *Littleton*, and the Commentary, still taking *Hawkins's* Abridgment, as his guide to the parts which are most useful; and if he means to enter more deeply into the subject, as he will find it his interest to do, he should [\*226] read these \*heads of the law as they occur in *Comyns's* Digest, *Bacon's* Abr., and *Viner's* Abridgment.

He will find a short summary of the same subject, with some of the more material distinctions, in the introductory chap. of the *Essay on the Quantity of Estates*.

The synopsis of *Littleton*, as published in some of the editions of *Coke Littleton*, is also a work which greatly facilitates the study of the subjects in *Littleton*.

The learning on descents, and on titles by succession, marriage, devise, testament, executorship, administration, bankruptcy, custom, forfeiture, &c. will now invite his attention.

On the doctrine of descents he should read the chap. on that subject in 2 *Blackstone's* Com., and next Mr. *Watkins's* excellent and detailed Treatise on Descents. To these books he should add *Robinson's* Treatise on Gavelkind; as showing the nature and history of customary descents, and the distinctions to which they give rise; also he will do right to refer to those passages in *Coke Litt.* which treat of these points; and he will find the chap. Descents, and Heir and Ancestor, in *Bacon's* Abr. and the titles, Descent, and Heir, in *Viner's* Abr.; and the title, Descent, in *Comyns's* Dig. of considerable use. This subject is of so much importance, as are the other subjects which relate to succession, transmission, &c.; that it is absolutely necessary to become perfectly familiar with them.

[\*227] The great points in successions by descent \*are the *possessio fratris*; the difference between actual and legal

or constructive seisin; the question of who shall be deemed the purchasing ancestor; and the necessity that the person claiming as heir shall be of the blood of the first purchaser, and of the whole blood of the person last seised.

The system of *Blackstone* in propounding the rules of descent, and detailing the reasons on which they are founded, and his universal preference, as far as relates to the first purchaser, of the paternal to the maternal line, gives to this subject an interest which will be sensibly felt, and places it on a basis which renders every part of this doctrine consistent in principle and application; while the opposite doctrine, which, in some cases, introduces proximity of blood, as entitled to a preference over worthiness of blood, defeats, to that extent, the preference of the paternal to the maternal line; and destroys the system, by placing it on the foundation of technical reasoning, and the rule of convenience adapted to a particular case, rather than a general plan; while a general plan, having symmetry in all its parts, ought to be the foundation of all laws.

In tracing the doctrine of descents, even into its most minute parts, no time will be lost. Every part of this subject will be found useful for the purpose of actual practice, for illustration, and to afford a scientific knowledge of the subject; and it is in this part of the law that \*the doctrine of tenures, and the connection [\*228] between our system of laws, and the feudal system, will deserve particular notice.

All, however, that is necessary for the English lawyer to read, is the chap. in *Blackstone* on the feudal tenures, Mr. *Butler's* note on the same subject, Sir *Matthew Wright* on tenures, and so much of *Sullivan's* lecture on the feudal law, as more immediately relates to this subject.

In this place, also, the doctrine of the tenures of this country, and particularly the difference between freehold and copyhold tenures, tenures in ancient demesne, and by custom, and between the ancient and modern tenures, especially the alteration made by the statute of *quia emptores*, 18 Edw. I. stat. 1, c. 2, and the statute for the abolition of military tenures, except the honorary parts thereof, 12 Cha. II. c. 24, will merit attention. On this subject, should be read *Blackstone's* Com. 2d vol., chap. 5, 6; the titles, Tenures, Homage, Seignory, in *Comyns's* Dig. the introductory chap. of Mr. *Watkins* to *Gilbert's* Tenures; also part of *Gilbert's* Tenures; the 2d part of *Coke Litt.*; the head Tenures in *Bacon's* Abr.; and, as greatly helping the memory, and also assisting the judgment on this subject, Mr. *Fearne's* ingenious chart of Landed Property.

The subject of Copyholds will also merit more close investigation. On this branch of the law Mr. *Watkins's* treatise contains nearly every thing that is useful; and it is hardly too much \*to say of it, that it is one of the best practical books in the [\*229] law.

A valuable supplement to that work would be a collection of the

points which peculiarly apply to copyholds under customary grants for lives.

Any further aids which may be wanted will be found in Lord Coke's Copyholder, the *Lex Customaria*, and the title Copyholds, in *Comyns's Dig.* and *Bacon's Abr.* Some useful forms will also be found in *Fisher's Copyholder*, and more in Mr. *Scriven's* recent publication.

The title by marriage is the next subject to be studied. This head of the law involves all the learning to be found in the Abridgments and Digests under the title of Marriage, and Baron and Feme.

*Blackstone*, vol. 1, chap. 15, should be read on this subject : and all the other useful knowledge will be found in *Comyns's Dig.* title Baron and Feme ; and in *Bridgman's Thesaurus*, under the same title.

To these may be added, whenever any extensive research may be necessary, the same heads in *Bacon* and *Viner's Abridgment*.

Some valuable knowledge on the same subject will be found in Mr. *Butler's Annotations of Coke upon Littleton*.

This head of the law, and the relations between husband and wife, are still more fully and amply discussed in a book, entitled, *Laws of Women* ; a book which seems to have experienced a neglect [\*230] by no means consistent with its merit. It is the most comprehensive, and, with reference to any single work, the most useful treatise on this head of the law. In a book, or rather two volumes, published by Mr. *Bridgman*, under the title *Thesaurus Juridicus*, there is a very useful collection, in chronological order, of the cases decided in equity, on points arising from the relation of husband and wife. Had that work been completed it would have formed one of the most valuable books in the lawyer's library.

The next head to which attention must be paid, is titles to real property by devise, and succession to personal property by executorship, bequest, intestacy, and distribution. Under the same head should be studied the due administration of assets of a deceased person.

On devises, as far as respects the external circumstances, and the modes of execution and attestation, the student should read *Powell on Devises*. As to the exposition or construction of the internal parts of the will, and the words by which estates may be limited or created, or determined, or defeated as to one person for the benefit of another person, the principal cases will have been read under the doctrine of estates ; also, in the treatises on the learning of contingent remainders and executory devises.

This subject requires the most minute attention. To go fully into the investigation, the chap. Testament in *Sheppard's Touchstone* ; the titles Devise and Wills in the Abridgments and [\*231] \*Digests, and *Gilbert on Devises*, should be read with particular care.

On the subject of executorship and administration, every thing which is useful will be found in *Toller on Executors*. *Blackstone's*



Com. vol. 2, ch. 32, should also be read. To these add *Sheppard's Touch*, title Testament, and the head Executor in the Digests and Abridgments, and Mr. *Wentworth's* Office of Executors. No branch of the law seems to have merited, or to have received, more attention than the office, duty, and power of executors. The importance and daily occurrence of the subject, called into activity by the death of every person who has any property, has induced professional gentlemen, from time to time, to employ their labours on these heads of the law.

On administration of assets, the more important knowledge will be found in the books which treat of executors and administrators. To these add the title Assets and Administration in *Comyns's* Digest; *Bacon* and *Viner's* Abridgment; *Bridgman's* Thesaurus; and *Lovell's* on the Will which the law makes; also *Blackstone's* Com. vol. 2, c. 32.

Some useful cases on the same subject will be found in *Comyns's* Dig. in the different subdivisions under the title Chancery.

On bankruptcy, all that is material will be found in *Cooke and Cullen*. The head bankrupt in *Bridgman's* Thesaur. also deserves to be occasionally consulted.

\*On title by forfeiture, *Blackstone's* Com. and *Comyns's* [\*232] Digest, under the head *Forfeiture*, afford all the knowledge which will be requisite in general practice. In *Hawkin's Pleas of the Crown*, a still more copious discussion on the law and consequences of forfeiture will be found.

The statutes of limitation, which after certain periods bar the right or some particular remedy, are also well deserving of particular notice. The statutes should be first read; next the commentary on them to be found in *Blackstone's* Commentaries; the title *Temps* in *Comyns's* Digest, and the title Limitations in the Abridgments.—*Mr. Cruise's* Essay on Fines, in that chapter which details the decisions on the statute of nonclaim on fines, should also be studied. These statutes may with propriety be considered as part of the same system as the statutes of limitation.

On the earlier statutes of limitation there are many useful points in *Brooke's* Reading on the Statute of Limitations.

The doctrine of uses and trusts should be now studied with particular attention, as giving rise to many of those niceties and distinctions which render the acquisition of legal knowledge difficult to those who have not made themselves acquainted with the differences between conveyances at the common law, and conveyances to uses; and those assurances which owe their legal effect to the doctrine of uses. He must also learn to distinguish accurately between

\*limitations at the common law; limitations of use which [\*233] may be executed into estate by the statute of uses; and limitations of trusts which remain equitable interests; and he must learn what conveyances are particularly adapted to these different species of property, as the modes by which they may be transferred. He should first read the Statute of Uses, and afterwards *Mr. Cruise's*

Treatise on this subject, or the chapter on the same subject in his Digest ; next the chap. on Uses in *Sheppard's Touch.* ; afterwards *Saunders* on Uses ; and finally Lord *Bacon's* reading on this statute ; and Mr. *Sugden's* edit. of Chief Baron *Gilbert's* Treatise on Uses and Trusts.

In the progress of studying this abtruse branch of the law, Mr. *Butler's* notes in *Coke* upon *Littleton*, on Uses and Trust, will be found of inestimable value. To open the learning on the same subject, *Blackstone's* Com. vol. 2. ch. 20 ; and that part of the introductory chap. of the Treatise on the Quantity of Estates, which gives an outline of the doctrine of uses and trusts, may be read with advantage. The notes in a former part of this volume, and those in the 1st and 2d volumes of the *Practice of Conveyancing*, to which a reference is made by the index, title Uses, at the end of these volumes, will aid this pursuit.

As connected with the same subject, and as forming a branch of the law peculiarly applicable to this learning, the doctrine on [\*234] Powers \*will require a considerable portion of attention ;

*Powell* on this subject, and Mr. *Butler's* notes in *Coke* upon *Littleton* ; the title *Poirar* in *Comyns's* Dig. and letter l. 2, 3, 4, 5, in the title Uses, in the same Digest ; and Mr. *Sugden's* very valuable Treatise on Powers, should be read ; and at the same time the doctrine of authorities, arising under particular acts of parliament, as the land-tax acts, and bankrupt laws, and authorities given by will to executors to sell freehold or copyhold lands, should be studied.

On this subject of powers, and also on uses and trusts in general, there are some useful notes in Mr. *Fonblanque's* Treatise on Equity.

At this period, unless it has been already done, the doctrine of the law respecting perpetuities, will merit a full portion of attention. Much useful learning will be found in Mr. *Fearne's* Treatise on Executory Devises ; also in Mr. *Hargrave's* Annotations in *Coke* upon *Littleton*, and in his Juridical Arguments, and Jurisconsult Exercitations, vol. 3, on the case which arose on *Thellusson's* will. Mr. *Butler* also has contributed a large portion of information on this subject in his notes on *Coke* upon *Littleton*, and his edition (p. 562) of *Fearne*.

As connected with this subject, should be read the statute of 39 & 40 Geo. III. ; and the note on that statute, written by the author of these observations, and which Mr. *Butler* has published in his edition of *Fearne's* Contingent Remainders, &c.

[\*235] The next subject to be considered is the \*form of assurances, *inter vivos*. These should be divided into assurances of record, and assurances not of record.

Of the former description are fines and recoveries. On these heads of the law, Mr. *Cruise's* Treatise on Fines and Recoveries, and the chapter on Fines and Recoveries in *Sheppard's Touchstone*, are by far the most useful books the student can read. But in searching for particular cases, *Viner's* Abridgment, and *Comyns's* Dig. title Fines and Recoveries, and *Bacon's* Abridgment, under the head Fines and Recoveries, must be occasionally consulted.

On the forms of deeds connected with these assurances, and on some of the purposes to which these assurances are applied, the practical notes on fines and recoveries, which form a part of the *Treatise on Conveyancing*, may possibly afford some assistance; and as throwing light on the same subject, as far as respects estates tail, the tract on Alienations by Tenant in Tail will be found useful. Mr. *Watkins's* Principles, chap. on Fines and Recoveries, will also assist the student in his researches on this abstruse branch of the law.

As to deeds which form so large a portion of the transactions in life;

The first object is to consider their external parts or circumstances, viz. the materials on which they are to be written, and the circumstances of signing when positively required; and in all cases, sealing and delivering, together \*with the evidence [\*236] which must be given in support of the execution of the deed to prove its validity.

Signature is not essential to a deed, either by the rules of the common law, or the statute of Frauds and Perjuries.

On these external ceremonies, should be read 2 *Blackstone's* Com. chap. 20; *Sheppard's* Touch. chap. 3; and *Peake's* and *Gilbert's* Treatise on Evidence.

Should it be necessary, on any particular occasion, to extend the inquiry, all the useful knowledge will be found in *Comyns's* Dig. and *Viner's* Abridgment, title Facts; and *Bacon's* Abridgment, titles, Grants and Obligations.

In the next place, the component parts of a deed should be considered, viz. The names of parties, the recitals, the *testatum* clause, including the consideration; the grant, including the words of grant and words of description; the exception; the habendum; the limitation of use; condition; the declaration of trust; the covenants, and the clause of "In Witness," &c.

All the rules which relate to the greater part of these heads will be found in *Sheppard's* Touch. *Blackstone's* Com. and in the Abridgments and Digests, under the title Facts and Grants.

The head Covenants will generally be found under a distinct title; and it is of infinite importance, with a view to preparing deeds, and sometimes construing them, to be conversant with this head of the law.

\*The chapter on exposition of deeds will necessarily form [\*237] a part of the present subject, as showing the rules for construction referrible to deeds, and ascertaining their legal operation. It remains only to consider the different species of assurance by deed.

They should be divided into,

1st, Deeds operating solely by the rules of the common law.

2dly, Deeds operating partly under the rules of the common law, and partly through the medium of the statute of uses; and,

3dly, Deeds operating wholly under the doctrine of uses.

Of the first description are,

Feoffments;

Grants ;  
 Leases ;  
 Assignments ;  
 Surrenders of particular estates ;  
 Surrenders of copyhold lands ;  
 Bargains and sales in execution of common law authorities ;  
 Exchanges ;

Confirmations, and Releases, either of right, or in enlargement of estate, or by way of extinguishment.

Of the second description is the assurance by lease and release, and all conveyances operating by the rules of the common law, with uses superadded, and to be executed into estate, through the medium of the statute of uses.

[\*236] \*Of the third description are,

Covenants to stand seised to uses ;

Bargains and sales of an use ;

Appointments in exercise of powers contained in conveyances to uses ; and deeds of revocation in exercise of powers for that purpose.

Declarations of uses of a fine and recovery strictly fall under the second head of division, as forming part of one entire assurance, constituted of a conveyance by the fine or recovery, and of the declaration of uses.

There are some instruments also which may affect the equitable title, though they have not any operation on the legal estate.

Of this description are articles previous to marriage. In short, all bonds and contracts, and all agreements for a valuable consideration, whether contained in deeds, or in writings merely underhand.

An equitable title may also arise from payment of purchase-money, or from any other cause which gives to a party the right in equity to call for a conveyance of the estate.

The title also may be encumbered, or affected by various operations, acts of parties, or of law ; for instance,

By seisin ;  
 Ouster ;  
 Disseisin ;  
 Discontinuance ;  
 Descents which toll entry ;  
 Entry ;

[\*239] \*Continual Claim ;  
 Warranty ;

Merger ;  
 Extinguishment ;  
 Remitter ;

And it may be encumbered by various means, as by debts to the king, by ownership, in a person being a debtor and accountant to the crown, although no debt exists ; judgments docketed, and in equity, by judgments, of which there is notice, though the judgments are not docketed ; by statutes merchant, statutes staple ; by de-

crees in equity; by a charge created by will for payment of debts, or any particular sum of money; by liens, or charges in equity, arising from *contract*, as articles to sell, articles to settle, &c. &c.

And these charges may cease by release, or by satisfaction or compensation, or by waiver, or abandonment.

On the different species of assurance, the 20th chapter in 2d vol. of *Blackstone*, and also *Sheppard's Touchstone*, should be first read; afterwards *Coke Litt.* under the title Release and Confirmation; and the notes of Mr. *Butler* in *Coke Litt.*; and these notes will be found particularly instructive.

To these annotations should be added *Watkins's Principles*; the several chapters at the end of *Saunders* on Uses; Mr. *Cruise's Digest*; and the several titles in the Digests and Abridgments, under heads expressive of the different assurances.

\*With respect to the particular form of each instrument, [\*240] and a general outline of its use, the Treatise on Conveyancing will, it is hoped, be found of some value.

On seisin and disseisin, much valuable learning will be found in different parts of *Coke Litt.* especially in the chapters on descents, which toll entries, continual claim, discontinuance, and remitter; also by referring to the index, title Seisin and Disseisin. The index in *Hawkins's Abridg.* title Seisin and Disseisin, will also be useful; and *Comyns's Dig.* title Seisin, will afford considerable assistance to the student.

The argument in *Goodright v. Forrester*, 1 Taunton, 559, contains a general outline of this learning.

On discontinuance, the chap. on that subject in *Coke Litt.* and the points collected in *Comyns's Dig.* under the same head, will afford the information proper to be obtained. The Digest of *Comyns* should be read as a step preparatory to the study of *Coke's Commentary*.

As connected with the same subject, read the chapter in *Coke Litt.* on Continual Claim, and Remitter, and Descents which toll entry; also *Gilbert's Tenures*, and *Comyns's Dig.* The doctrine of warranty, and statute of limitations, are also relevant to this head of the law; and the learning on the subject should be extracted from *Gilbert's Tenures*, *Coke upon Littleton*, chap. Warranty, and the cases, as they are digested by *Comyns*, under the title Warranty.

\*As a directory to the more useful matter in *Coke* upon [\*241] *Littleton*, the abstract of the text by *Hawkins* will be of great use, and the analytical digest by way of index to that abridgment will be found particularly useful. The value of *Comyns's Digest* consists, in a great measure, of the arrangement, and for the ready access it affords to *Coke upon Littleton*, and the Reports, for the point under consideration.

The like observations apply to the doctrine of remitter, and the mode of studying this head of the law.

As to the king's debt, consult *Viner's Abridgment*, title Prerog.

*Comyns's Digest*, title Debt ; and also the statutes by which the common law has been altered. To these books may be added *Sheppard's Abridgment*, title Prerogative.

As to the judgments, *Tidd's Practice* affords the most useful information. On statutes merchant, statutes staple, and recognizances, *Sheppard's Touchstone* contains more information than any other book.

The different heads on this subject in the Abridgments should also be consulted.

On charges for payment of debts, &c. the head Trusts in the Abridgments, and the head Charge in *Viner's Abridgment*; Mr. *Bulter's* note to *Coke Littleton*, on Uses and Trusts ; *Comyns's Digest*, title Chancery, under the subdivisions, will be the proper books to be read.

The more useful learning on the subject is at present scattered in the Reports.

[\*242] \*To go through this course of reading, to collect all the principles, to understand the distinctions, and to discover the exceptions, will require the study and the close application of many years. And to a person who has time before him, that time cannot be more advantageously employed than in sifting each head of the law to the bottom, as far at least as it can apply to general practice. Each subject will be found to illustrate another; at least to constitute a part of it, and render each successive head of the law more interesting, more familiar, and more easy.

But to a person with whom it is an object to acquire a competent share of knowledge for actual practice, within a short time, as two or three years, the course of study to be recommended is to read *Blackstone's Commentaries*, with a view to general principles, and which is of infinite importance, the excellent arrangement of that work; also, all the books to which he refers as authorities, so far only as they are material to the point for which they are quoted; and at the close of each chapter to read Mr. *Watkins's Principles* on the same subject; next *Wooddeson's Vinerian Lectures* on the same head; and finally, the corresponding titles in *Comyns's Digest*, and *Sheppard's Touchstone*.

With proper attention in reading these books, the chances are, that the person who shall pursue this course of study, will, at the end of two years, feel himself equal to the general [\*243] business \*of his profession, and capable of forming a sound and correct opinion on the general points which occur in practice.

But that he may be an accomplished lawyer, and equal to those difficulties which continually present themselves in the course of extensive practice, the more enlarged course of reading which has been recommended will be necessary; and the leading cases in the Reports should be uniformly consulted, before any decisive opinion shall be formed on any point that appears doubtful, or is involved in considerable nicety. In cases of this nature, the Abridgments and

*Digests* should be considered only as indexes to the Reports. And it is of infinite importance that a person in actual practice should be familiar with the decisions which have taken place in the courts of justice, within the last century; and as leisure will admit, research should be extended through the preceding century, so as to carry them back to the time of the Reports of *Plowden*, which may be considered as the first book of Reports of any excellence; and indeed, as the name imports, a very learned commentary in arguments by counsel, and judgment of the court, on the several points which came into discussion.

Indeed, there is contained in the Reports of *Plowden*, and of Lord *Coke*, more sound law and useful matter, at least to the conveyancer, than can be found in the works of any two other reporters to be named; or perhaps in any two books of the law.

\*In considering the duties of the conveyancer, in regard [\*244] to abstracts of title,

1st, The commencement of the title.

2dly, The progress of it.

3dly, The evidence by which it is supported.

4thly, The mode of analyzing the Abstract.

5thly, The conclusions to be drawn from the whole abstract, are the principal points to be considered.

In this investigation many repetitions of former observations will occur; they are permitted to remain rather than interrupt the chain of arrangement. In a book designed for practical use, these repetitions are not only allowable, but are highly useful.

#### *As to the Commencement of the Title.*

THE general rule is to take care that there is evidence of a title, placed within the power of the purchaser, so as to afford to him a reasonable expectation, that he may hold the estate without interruption, and free from all claims which, in the nature of things, can be made.

The leading points in a title are, that no one can give that which does not belong to him; in other words, *qui non habet ille non dat*; and the estate granted to every person will determine at the same time as the estate of the grantor will determine.

This rule is expressed in these terms, *cessante statu primitivo cessat etque derivatives*. The exceptions to this rule create some of the many \*difficulties which arise in understanding titles; [\*245] for instance, tenant in tail may, by a common recovery duly suffered, acquire the fee simple; or by a feoffment or fine, operating by discontinuance, he may gain a fee simple without acquiring a good title to such fee simple.

Again, a tenant for life, by a tortious alienation, by feoffment, fine, or recovery; or tenant for years, or for any chattel interest; by feoffment, or a stranger by disseisin, intrusion, or abatement, may acquire a wrongful estate; thus the estate or seisin; not merely the

possession ; may be in one person, and the right or title of entry, or of action, may be in another person.

Few points are in modern times more important than to distinguish between those acts which are a mere dispossession, and those which constitute *disseisin* ; very erroneous notions seem to prevail on this subject.

This wrongful estate may become a good title by the release, including, when circumstances, as an entail, require it, a fine with proclamations, or recovery of the rightful owner ; or the seisin may be defeated, and the right of entry may, by entry ; or the right of action, may, by action, judgment and execution, or by remitter, again become the seisin or estate.

These points must be considered more at large, in observing on that part of the abstract in which the power of the grantor is to be discussed.

[\*246] Except in particular cases, in which the want \*of such evidence may be accounted for, as the destruction of title deeds by fire ; the continuance of an estate in the same family for a long series of years, without family settlements or wills ; a purchase made for convenience of a small portion of a large estate ; or the like ; the evidence of the title should commence with the deed of conveyance, will, or settlement made about the period of sixty years, by the person, who at that time appears to have been the absolute owner.

To carry back the evidence beyond this period, often occasions an useless investigation, and an unnecessary delay and expense. But there are cases in which it is not only proper, but necessary, that the evidence of the title should be taken up from a more early period. This is particularly the case as often as an entail was created upwards of sixty years since ; and the first deed falling within that period, relates to the estate tail. Under these circumstances, the creation of the estate tail, and the existing right to bar the same, should be shown ; at least if they be not shown, the counsel for the purchaser should do all in his power to collect the evidence of the creation of the estate tail and the right to bar the same.

- At the same time, it should seem, that the want of such evidence does not, of itself, constitute an objection to a title, though it certainly renders the title less eligible.

[\*247] Also, when a title depends on an estate tail, \*or a remainder in fee, which was limited or created upwards of sixty years ago, and has fallen into possession within a recent period, it is important to the title that the deed or will by which this estate tail was created, or remainder limited, although such deed or will was executed at a distance of more than sixty years, should be abstracted.

Also in a title depending on heirship to the first purchaser, the evidence of the title of the ancestor who was the first purchaser should be shown, although he became the purchaser upwards of sixty years since.



Though there be some convenience in the rule which fixes on sixty years as the period at or about which the commencement of the title should be taken; yet, it is not to be concealed, that many titles which appear to be good, during the period of sixty years, would appear to be defective if the more early evidence of title were known. This happens more especially in the instances in which there are particular estates with various remainders over, and an entail is barred by fine instead of being barred by recovery; and also, when there is an estate for years, with remainder or reversion in fee, and a feoffment is made, or fine levied by the termor during the term, and no advantage is taken of the forfeiture. A third instance is, of estates tail of the gift of the crown, with the reversion in the crown. A fourth instance may be put, of titles subject to implied warranty by exchange, or of \*estates exchanged [\*248] with ecclesiastical persons, and other persons incapable of making an effectual exchange.

In all these instances the title may be defective, notwithstanding the lapse of the period of sixty years; and sometimes it will happen, that eviction may take place after peaceable possession for a period of more than sixty years, accompanied with deeds and other documents carrying on the evidence of the title with apparent regularity throughout that period.

The case of a title to an advowson is another instance in which the evidence for a period of more than sixty years may be important; and when there are attendant terms for years, and they were created at the distance of more than sixty years, it is usual if circumstances will admit, to deduce the title from the period at which the terms were created.

This practice is founded in reason, since it is a rule of law, that the possession of the termor is the possession, or rather continuance, of seisin in the owner of the reversion or remainder-man; for the reversioner or remainder-man cannot be disseised while his tenant continues in possession; and even, though the termor be ousted, yet while there is a right of entry, as distinguished from a right of action in the reversioner or remainder-man, a re-entry by the termor will re-vest the seisin in the reversioner or remainder-man; but when the reversion or remainder is turned into a right of action, as by a descent \*cast, or by a discontinuance by tenant in [\*249] tail, or the like; then an entry by the termor will not restore the seisin to the reversioner or remainder-man; for it would be absurd, that the entry of a termor should produce an effect which would not be produced by the entry of the person who has the reversion or remainder.

So also, when an appointment is made in pursuance of a power, and that power was made to over-reach estates in strict settlement, the deed creating the power, though dated upwards of sixty years since, ought to be abstracted; or if the deed itself cannot be produced, the language of the power should be stated from the re-

citals ; and this is a reason in preparing deeds of appointment, for stating, by way of recital, the creation of the power fully.

Also, in the deduction of a title to a term of years, created upwards of sixty years since, the deed creating the term ought to be shown, though, as already observed, the want of evidence of the creation of such term does not, after a lapse of a long period, afford an objection against the title.

Also, if the possession has been held by the same person for sixty or even eighty years, as was the case of ——— the commencement of her title, and also of the testator, or other person under whom she derived her title, should, if possible, be shown. For if it should turn out, as it did in that case, that such person had only a particular estate, the title would be defective, [\*250] notwithstanding the period which had elapsed ; and therefore, more than usual and ordinary evidence may be expected by the purchaser.

Also, in titles derived from a grant from the crown, the grant should be shown, that it may appear that no reversion was retained by the crown ; and also, that the nature of the rents and services which were reserved may appear ; and that the grant was not in tail, and for services performed to the crown ; and consequently, that no impediment arises from a remainder or reversion in the crown.

And if the first deed in an abstract refer to a person claiming as devisee, inquiry should be made for the will under which he derived his title, unless the will be abstracted.

The general rule of taking up the commencement of the title, at or about the period of sixty years, arises from the circumstance, that sixty years is the extreme period of limitation for bringing a writ of right, which is the remedy of the highest nature, and, in many cases, the last resort.

The proposition of *Blackstone* (3 vol. 196,) is, that the possession of lands in fee-simple uninterruptedly for threescore years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever.

By possession must be understood adverse possession, as distinguished from possession under a term of years, or other particular estate.

[\*251] But this proposition is too general, and for that reason not correct ; for a title may be defective after a peaceable possession for sixty, one hundred, or any other number of years, although there has been a seisin by wrong of the fee-simple ; and consequently an adverse possession ; for instance, if *A* be tenant in tail, remainder to *B* in tail, remainder to *C* in tail, with divers remainders over, and *A* make a conveyance by lease and release, or by lease, release, and fine, a possession held under this conveyance will never be adverse to those in remainder as long as there shall be any issue of *A*, who might have inherited his estate under the

form of the gift ; and if at the end of sixty, or any other number of years, there should be a failure of the issue of *A*, the right of *B* to claim would commence ; and he might make his claim at any time before he was barred under the operation of nonclaim on a fine, (if any) or by the statute of limitations of 21 James I., which allows him twenty years, from the time when his right commenced ; or if then labouring under disabilities, ten years from the time when these disabilities shall be removed ; and even, if the title of *B*, or of his issue, should be barred, either by nonclaim on a fine or by the statute of limitations of 21 James I., the title of *C* may remain unaffected ; and as his right of claiming does not commence till the failure of the several issues of *A* and *B*, he will be allowed a further period for making his claim, after the failure of such issue shall have happened.

\*Sometimes there is not any direct evidence of title for. [\*252] more than thirty or forty years ; but the state of the title during the preceding thirty years is to be collected from the recitals in a former deed, or from a short history of the title, disclosed in the description of the parcels, or from a schedule of title deeds.

In transactions of small value, which will not bear the expense of nice, critical, and extensive investigation, although the purchase may involve all the property of the purchaser, such secondary evidence, if it appear to have passed through the hands of a person conversant with his profession, and on that point an opinion may be formed from the accuracy of the deed in which such secondary evidence is found, such secondary evidence is considered satisfactory.

But in transactions which will justify the expense, it is proper to call for direct evidence of the deduction of the title ; and the deeds, or at least attested copies of them, should be sought for in the hands of all persons most likely to have the custody of the deed or copies.

This search should be directed among the papers of persons who are the present owners of lands held under the same title ; also, among papers in the hands of persons who covenanted to produce the title deeds, or their representatives, and of solicitors concerned for their successive owners.

And when an estate has been sold in parcels it has rarely happened that this search has been made in vain. The probability is, that attested \*copies at least will be found in the [\*253] custody of some or one of these persons.

In the case of title to copyhold lands, recourse should be had to the court-rolls ; and as to these lands, there cannot be any pretence for limiting the inquiry for any information which may appear to be material, since ready access may be had to the court-books, unless, and this rarely happens, the court-books have been lost, or destroyed by fire.

And as to lands in register counties, the advice should be to

search the register for the purpose of obtaining a clue to all the information it can afford.

And as to the estates of Roman catholics, prior to the act of the 31st year of the reign of his late majesty, c. 32, the exact state of their titles may be found enrolled with the clerk of the peace of the county within which the lands are situate, or in one of the courts of Westminster Hall.

When the part of the evidence of title for the last sixty years depends partly on possession, then the production of leases, and enjoyment under them, as evidence of the possession; or, if no leases can be found, the production of assessments to the land-tax, rentals, and even maps and parish-rates, should be required as affording reasonable evidence on this point.

And in this place, it is to be observed, that if the evidence of the title relate to a reversion or remainder expectant on a lease [\*254] which was made sixty or even one hundred years ago, the \*evidence of the title should be deduced from the lessor, because it is a rule of law, that the possession of the tenant is the possession of the reversioner; and that the receipt of rent from my tenant does not disturb my title, consequently the possession is never adverse to me while the lease continues, and the possession is held under the lease; except, indeed, that if no rent was received for sixty years, and no act of ownership in cutting timber, &c. had been exercised during that period, a writ of right could not be maintained by the reversioner, since he had never received what in law are termed the esplees. But though this would be an objection to his maintaining a writ of right, it does not appear to be any bar to his maintaining an ejectment within twenty years after the possession shall fall, or within ten years after the disabilities, if any shall be removed. *Hunt v. Bourne*, 2 Salk. 422, proves that an ejectment may be maintainable in respect of an estate tail, although the remedy by formedon was barred.

When a title depends in its more recent stages on descents, an authentication of the pedigree should be required by evidence; as certificates of baptism, marriage and burial; and in particular cases there should be affidavits by members of the family, or the persons to whom the family were known, respecting the state of the family, and identity of persons; and in regard to noble families, *Collins's*

Peerage; and in regard to other families, monumental inscriptions, tomb-stones, and the like, should \*be examined; and in some cases, local histories, not as direct evidence, but as affording a clue to more material information.

It is, as already noticed, the better opinion, that a title may be good even though it depend merely on descent from ancestor to heir, and heir to heir, through successive generations, without any will, settlement, or other conveyance appearing; but such a title should be viewed with particular jealousy, and the courts of record should be searched for fines and recoveries; and the ecclesiastical

courts having jurisdiction over the effects of the respective owners, should be searched for wills, letters of administration, and the like; and it is even prudent, that in a case of this sort every aid should be borrowed, for the purpose of guarding the title against latent entails and dormant encumbrances.

In a case so circumstanced, it was, as already noticed, deemed advisable to have a feoffment from the present possessor, and to take a conveyance by lease and release, a fine with proclamations, and a common recovery, from himself, his brothers and sisters; and even with these precautions the title was considered by two eminent conveyancers, on a reference to them for that purpose, as worth no more than two third parts of the value of the estate, with complete and full evidence of its deduction.

No vendor, however, unless in great difficulties, could be advised to submit to such a \*sacrifice, without taking the \*[256] opinion of a court on the sufficiency of his title.

Sometimes an objection has been taken to a title, because a person through whom the title is derived was tenant in tail, and apparently, had the remainder or reversion in fee by descent; and he levied a fine, instead of suffering a common recovery.

The objection proceeds on the ground that the reversion might not have been in him, but might have been aliened or settled. But though these facts certainly call for caution, and should lead to investigation into the title to the reversion, as far as it can be traced; it has been decided (*Sperling v. Trevor*, 7 Ves. jun. 497,) that the objection itself shall not prevail. The decision must be understood to contain the qualification, that the purchaser cannot show that there is an outstanding title under the remainder or reversion in fee.

With this qualification the decision is reasonable and consistent with all those principles of moral certainty which govern the court in deciding on titles. It was founded on the ground that a mere possibility, which in fact may exist, and not be known to either of the parties; and which, in the nature of things cannot be ascertained by either of them, shall not be allowed to operate as an objection to the title.

Were the vendor in the situation of tenant in tail, with the reversion in fee, by descent, the purchaser might require a recovery to be \*suffered, at least, on offering to pay the expense of the recovery. [\*257]

And under the covenants for further assurance generally introduced into purchase deeds, settlements, &c. the purchaser himself might have obtained, though he might not have had a right to compel the vendor to obtain, a recovery from the tenant in tail, under whom the title was derived. But if the tenant in tail were dead, or under disabilities, this resource would fail.

It has occurred sometimes, that a title commenced with a fine levied, and a deed prepared, professedly for barring all estates tail, &c.; and no estate tail has appeared; and it has been objected,

that the title may be bad, because the contisor in the fine might have been merely tenant in tail, and the reversion or remainder might have been in a stranger. But now the prevailing opinion is, that this objection, resting simply on these grounds, cannot be supported. Such language is frequently adopted from some ill applied precedent.

When, however, it is suspected on the behalf of a purchaser, that there is some information in the knowledge of the seller, respecting the state of the title, and which he has not disclosed in the abstract; or that he has withheld some material deeds, the purchaser is entitled to a discovery from the seller of all the information which he can communicate; and this may be enforced by a bill in equity, or under the usual order of reference, that the parties shall be [\*258] \*examined on interrogatories, and produce all deeds in their custody, power, &c.

It may also be repeated in this place, that titles are always received by professional men with greater confidence, in proportion as changes in the ownership have taken place, or successive sales among persons resident in the neighbourhood have been made; for it is in the neighbourhood in which the lands are situate, and among the occupiers, that the rumours or suspicions of defects of title are most likely to be circulated.

And a subdivision of the parcels among different purchasers, especially among persons who were tenants, adds still further to the probability that the title has been closely and minutely investigated, and fully understood.

On the other hand, there are some exceptions to these reasons for confidence; and it is the knowledge that these exceptions exist which renders it the duty of the conveyancer, not to be satisfied with a title rested on such confidence.

Lands bought or exchanged for convenience, from a large proprietor, whose family have been the owners for a long series of years, will frequently be accepted without the production of title. Many such instances exist, especially in manufacturing districts.

These lands will be improved by building costly mansion-houses, &c. and these purchases will have been taken from, or exchanged, [\*259] changes made, \*with a gentleman or nobleman, whose property was in strict settlement.

On minute investigation, the title will be found defective, and unmarketable, without any power from circumstances of minority, &c. to supply the defects in the title. Distress, and sometimes ruin, especially to persons in trade, and who want to sell or to mortgage, to obtain money to answer demands on them, is the immediate or remote consequence. The like occurrence sometimes takes place under building leases accepted without any, or without a sufficient, investigation of title, from persons assuming to be absolute owners in fee-simple, but who have encumbered their property by mortgages, or put it into settlement, or hold it under settlement, or under entails not effectually barred.

Titles under west-country leases for years determinable on lives, are often in a similar predicament.

So are leases made in exercise of powers not duly pursued.

Formerly, it was deemed a breach of honour, and a departure from policy, to impeach these leases. Modern notions, and the necessities induced by extravagance, have thrown down this barrier, and confidence is destroyed. Hence the strictness of modern practice compared with the practice of former times. Hence, the importance, and even the necessity of having evidence of a good title in all cases of this description.

\*But little or no attention should be paid to mere rumours [\*260] of a defect of title, unless these rumours can be traced to some reasonable source. The vulgar notion of *heir-land*, founded on the doctrine to be found in Glanville, that the person who took as heir could not alien without the consent of the person next in succession; and the impression which many persons have derived, no doubt from the language of the statute *de donis*; and from the effect which that statute obtained, before common recoveries were introduced into general practice, subject many titles, which are really good, to the imputation, among persons of little or no legal knowledge, of being defective; and there are always to be found poor relations of an ancient family to urge their claims, as being the right heirs. The system of strict settlement on the parent for life, with remainder to the first and other sons in succession; a system which suspends the power of alienation in fee until the concurrence of the eldest son is given, has tended to perpetuate this notion of *heir-land* among common people.

No doubt many titles are received as good which would appear to be defective, at least disputable, were the real circumstances of the title fully disclosed, or fully known.

On the other hand, the evictions which take place in modern times are very few in number; and many good bargains are lost from a scrupulous nicety in the investigation of titles; ending in their rejection.

\*The proper course to be pursued, on the part of counsel [\*261] in giving advice, is to point out to the purchaser the degree of risk to be run, and leave it to him to decide for himself on the prudence of running that risk.

Few purchasers, however, are justified to themselves, or to their families, in accepting a title, unless the title be, or in the compass of a few years will be, in a marketable state, in point of evidence to a future purchaser, or to a mortgagee.

For want of a marketable title, there is property without the means of converting it into money, or raising money on the security thereof on an emergency.

In requiring that the evidence of the title should be carried back through the period of sixty years, or even a further period, circumstances must materially govern the opinion of the conveyancer.

When, as it has been already observed, there has been a frequent

change of ownership, from one purchaser to another, and the possession has been uninterrupted, the presumption is very strong in favour of the title, although the evidence disclosed by the abstract does not carry back the history of the title for more than forty or fifty years; especially if the want of the earlier deeds can be accounted for in any reasonable manner; as by the circumstance, that the lands in question are part of a larger estate, or that [\*262] a fire has happened in the family of one \*of the proprietors, or of a mortgagee, or from any like cause.

It is in reference to family estates, in other words, lands which have remained in the same family for a long series of years, and have been the subject of different settlements or wills in that family, and have descended from one member of the family to another, in a long succession, that more than ordinary caution is required. Under such circumstances the evidence of the title should be carried back as far as circumstances will admit; and at least for a period of sixty years, if the ownership of this family commenced at, about, or before that time. This observation is equally relevant, whether the purchase be made immediately from one of the branches of this family, or be derived under a conveyance made by them within the last twenty, or even thirty years.

In proportion too as the presumption of a good title shall be weakened, from the want of frequent change of ownership; or, in the case of a purchase of part of a family estate, by the circumstance, that the person of that family who was the vendor lived till a recent period, so that there has not been any great length of adverse possession, admitting that he had only a particular estate, should the diligence of the conveyancer be exerted, to ascertain the precise state of the title of the person by whom the sale was made; for if it should turn out, as in practice it sometimes does, [\*263] that he was only tenant for life, or \*that he was only tenant in tail, without having barred the entail, or the remainders over, the title will be open to eviction.

Even the chance that such might have been the condition of the title, suggests the duty of endeavouring to ascertain its precise state; but if the seller died shortly after the sale, and thirty or forty years have elapsed since the sale was made, and no claim has been asserted, the presumption arising from these facts is highly favourable to the title, and leads to the inference, that the person from whom the sale proceeded was competent to make the conveyance under which the title is deduced from him.

Also, though the first deed or will in an abstract be dated at the distance of sixty years or upwards, yet if the parcels are granted by a *general denomination*; as lands purchased of *A*, or devised by the will of *A*, it is the practice to require the production of the deed by which the lands were purchased, or of the will by which the lands were devised; and yet the subsequent evidence may so identify the lands, that no one can reasonably doubt the fact, that the lands were so purchased or so devised.



The like observation applies, in a degree, to lands described in a deed or will by the name of the occupier, as an essential part of the description.

However, it is a general rule, never, except in one case, to suffer a title to lands held in fee, or for lives, and which refers to a will, as \*part of the means of its deduction, to escape the investigation which the will may afford. [\*264]

The excepted case is in the instance of a very ancient will; so that if the will were produced, there would be a long chasm in the evidence of title. Under these circumstances, to call for the production of such will, without being able to obtain the evidence of the intermediate steps in the title, might lead to useless anxiety.

Extraordinary occurrences in the title, as feoffments made, or fines levied, or recoveries suffered, without any apparent reason for these species of assurance, also excite suspicion that there are some material facts in the title, not disclosed by the abstract. Such assurances invite the caution of the conveyancer, and suggest the propriety of a research into the history of the title in every channel through which it can be traced.

With a view, therefore, to practice, in preparing deeds, it is prudent, whenever the circumstances will admit, without injury to the title, to disclose the reason for making a feoffment, levying a fine, or suffering a recovery, so as to remove those grounds of suspicion which otherwise might attach; for instance, when a fine is levied, or recovery suffered, merely for caution to guard against dormant entails, the motive of levying the fine, or of suffering the recovery, should be stated; and it should be distinctly expressed, that there is not any knowledge of any entail.

\*Also, when a fine is levied by a husband and wife, the [\*265] legal presumption would be that the lands were the inheritance of the wife, unless the contrary appeared. Therefore, in declaring the uses of the fine, or in the deed of covenant for levying the fine, it should be stated that the lands are the inheritance of the husband, when the fact will warrant it, or the recital should be varied so as to be adapted to the fact.

In deeds dated at the distance of 30, 40, or 50 years, there may be found a covenant from a husband and wife, that they would levy a fine. Frequently such fine was requisite only on account of a title of dower in the wife; and no fine was levied, and the death of the wife has rendered it immaterial. But unless the real state of the title appeared, there would be a difficulty in the title, from an apprehension that the lands were the estate of the wife, and that the title may be open to a claim by her heirs; while if the seisin appeared to have been in the husband, the death of the wife, and the determination of her title of dower, might be proved, or would be presumed, and no difficulty would exist.

Another case frequently occurs, and deserves attention.

The abstract commences with a deed, dated above sixty years ago; being a conveyance from husband and wife of lands of which

they were seised in right of the wife ; and there was a [\*266] covenant that they should levy a fine ; but on \*the most diligent search no fine by them can be found.

A title thus circumstanced is frequently accepted on the ground, that as sixty years have elapsed, no writ of right could be maintained by the wife if living, (an event not in any degree probable,) or by her heirs. And in this place it may be observed, that thirty years would bar the wife herself of her writ of right ; and that sixty years are never allowed to any person, except the right is *ancestral*, that is, first accrued to an ancestor, and descended from him to an heir ; and that a bar to the ancestor, because thirty years ran in his time, is a bar to the heir claiming in right of the ancestor ; at least there would be an absurdity in the statute of limitations, unless this be its true interpretation. On this subject a more ample discussion will be given in a subsequent part of this work.

But a title of this description is attended with one difficulty. Although there may be a bar to the remedy by writ of right, it does not follow that there is a bar to the remedy by entry, or by writ of entry.

In the first place, in reference to the right of entry, there is not any adverse possession against the wife during the coverture. For want of a fine from the husband and wife, the alienation is, in substance, by the husband alone ; so that till the determination of the coverture, by the death of the husband or of the wife, the [\*267] \*possession under the conveyance, is under a title proceeding from the husband ; and if the husband was or became entitled to be tenant by the curtesy of England, then the possession under the conveyance is by title, until the death of the husband, although the wife may die in his life-time.

Thus 20, 30, 40, 50, or even 80 years, may elapse, and the possession be rightful, because the husband lived so long. He may sell at 21, and die at the advanced age of 80, 90, or 100 years or upwards.

The right of possession, unless barred by a nonclaim under a fine, may continue for twenty years ; and if the person to whom the right first accrued should be under any disability, the bar may be protracted for an enlarged period, (being ten years) from the time at which the disabilities shall cease.

These observations are added in this place, to show that a title thus circumstanced is not necessarily good, though sixty years have elapsed. For that reason the state of the title under adverse possession, should be investigated, before a purchaser, requiring a secure title, should be advised to complete his purchase.

Also reputation that a title is bad, or an assertion of right by one of the family of a former owner, or the like circumstance, is a ground for the most minute investigation, and for having every link in the chain of evidence complete ; for it seldom happens [\*268] that such reputation \*arises, or such claim is asserted, with-

out some cause, except in the instances which are noticed, as depending on vulgar errors respecting heir-land.

Conveyancers are frequently censured for making inquiries, which appear unnecessary, and even frivolous, and which often fail of producing any beneficial result, or useful information ; and beyond all doubt, the expense which attends these inquiries does, in the aggregate, greatly exceed the value of the information which is obtained. But experience dictates the necessity of these inquiries, and the individual, whose interest is at stake in the particular transaction, is, in point of security, abundantly compensated for the expense which is incurred ; and if the seller has been so unfortunate, that the necessary inquiries were not made on his part, when the purchase under which his title commenced took place, he has to blame the want of caution in those who were bound to watch over his interest.

The purchaser also must consider, that unless those inquiries are made on the present occasion, they will probably be made on his sale, or on his mortgage, should any take place ; and he will not only sustain the expense and delay of ascertaining the facts, but may have an objection taken to his title ; and in the mean time be exposed to the danger that the title may turn out bad, defective, or encumbered ; and be fettered with great difficulties, from the delay \*which may arise in completing the sale, or in [\*269] obtaining money on a mortgage, at a time when it is of the greatest importance to him to receive the purchase or mortgage-money.

Property in land, without the means of carrying it to market for the purposes of sale, or mortgage, is frequently a snare, rather than a benefit to the owner. He enters into engagements, or pledges his credit, or contracts debts, on the faith, that he can convert his land into money whenever he pleases ; and the difficulties, and even ruin, to which families are exposed, by the discovery of a defect in a title, and the consequent inability to complete sales, or to effect mortgages ; and even the doubts on titles, which render a suit in equity, and consequently some delay necessary, cannot be appreciated by any persons except those who have had experience on these points.

In short, any person who buys an estate, (except it consists of a small quantity of land merely for convenience,) and especially those who buy an estate for residence, or with a view to building, or other costly expenditure, should be particularly careful, that the title is not only apparently good, but such as in the technical language of the courts is *marketable*, so that he may compel an unwilling purchaser to accept the same ; and may also exhibit the title in a state which shall exclude all just grounds for any doubt of its validity.

One of the great uses of property in land is \*to afford, [\*270] not only permanent security in enjoyment, but the right to convert it into money, or to raise money on its security, as occasion

shall require. To the merchant or trader in particular this is of the highest importance ; and, in every situation of life, the advantage of having a good title, so as to raise money without difficulty or delay, either by sale or by mortgage, at pleasure, will be sensibly felt.

Even persons contracting for a lease may now investigate the title of the intended lessor, unless there be a stipulation to exclude such right.

An estate without a marketable title, though that title be good for the purposes of enjoyment, partakes of the nature of an income rather than of property ; and in the hands of the greater part of mankind is comparatively of little value.

Even when an estate is purchased with a view to convenience, either for the purpose of rendering an estate compact, by buying intermixed grounds ; or for extending the family estate ; every necessary care, which the circumstances will admit, should be taken, to have the best title and evidence of it, that, in the nature of the case, can be procured.

The want of such caution, and still more the want of attention, in preparing the particulars of sale, has more than once been the cause of a contract being rescinded, because the title to that [\*271] part of the estate which, at the time of the \*purchase, was particularly eligible for its convenience ; as a piece of ground in front of the house, or in the garden, or the pleasure grounds ; was defective.

A material distinction, however, may be safely made in regard to lands professedly purchased with a view to sale, or with the expectation of raising money by mortgage, or for personal occupation, with an intention that the lands shall be converted into money on the death of the purchaser on the one hand, and lands which on the other hand are purchased for the convenience of the purchaser, either for trade, or for rendering the estate compact, &c. without regard to remote consequences.

In the latter instance it may be sufficient that the result of every reasonable inquiry should prove that there is a fair chance of the title being good, and of peaceable enjoyment.

This, however, must depend on the discretion of the purchaser. In the former instances, it is of the utmost importance that there should be evidence of a good title ; and that the title should be such as is strictly marketable.

These observations may be considered as forming part of that arrangement of this essay, in which conclusions are to be drawn, from the abstract, on the state of the title ; and in short, it is rather with a view to this conclusion, and as a primary object of it, that attention is in this place to be paid to the evidence of the commencement of the title.

[\*272] \*In those instances, in which it appears on a first view that the evidence is taken up at too modern a period, the best course is at once to return the abstract for the purpose of having the earlier evidence of title supplied.

Before this head shall be closed, it will be proper to observe that *lay corporations* are as competent to alien their landed property for corporate purposes, as individuals are to alien their property. But it rarely happens that they can show the commencement of their titles; and leases and rentals are the only evidence of their seisin; and this evidence must be deemed satisfactory; and the title may be treated as good under such evidence, unless there be notice that the corporation, as frequently happens, hold the land subject to some trust, and they are not by the trust, or by some act of parliament obtained for the purpose, qualified to make a good title to the exclusion of the trust.

There is one peculiarity attending corporations. They have a fee simple for the purposes of alienation, although they have only a determinable fee for the purposes of enjoyment. On the dissolution of a corporation, the reverter will be to the original grantor, or his heirs, and not to the lord by escheat; and yet this grantor, in the case of a corporation, as well as the lord by escheat, in the case of an individual, may be excluded by an alienation in fee simple.

By a grant to a bastard, or a denizen in fee, he has a fee simple, for all the purposes of \*alienation, although there [\*273] be a right of succession to a limited series of heirs, since none besides descendants can be his heirs.

Though the succession is by law thus restricted, he is tenant in fee-simple, and not tenant in tail. On the failure of his heirs there will be an escheat to the lord of the fee, and not a reverter to the grantor, or his heirs; while on the dissolution of a corporation, and consequent failure of successors, the lands will revert to the grantors, or their heirs. But there is this similarity in the situation of a corporation on the one hand, and of a bastard or denizen on the other hand; either may alien the fee-simple; but there is also this difference; the grantor to the corporation, and his heirs, will have lost all right and chance of reverter, while in the case of a bastard or a denizen, the lord of the seignory will have the chance of escheat on the failure of the inheritable blood of the tenant for the time being of the fee-simple, whoever that tenant may be.

Cases frequently occur of corporations being dissolved, or ceasing to exist, and of a new incorporation.

This new incorporation, unless it be by act of parliament, cannot, except as against the crown, nor as against the crown, unless there be a special and express grant for the purpose, revive in the new corporation a title to the lands which belonged to the old corporation.

\*Consequently a title asserted by the new corporation, [\*274] to lands which belonged to the old corporation, must be minutely considered, and the chance of eviction be weighed.

But the same corporation may have continuance, although there be a change in its name, or in some parts of its constitution; and it follows, that the title of the corporation to its lands will continue.

On the commencement of abstracts, as they apply to terms of years, and other minor points, the leading observations proper to direct the attention of the conveyancer, will be found in the division which treats of the form of the abstract.

*Of the Contents and Progress of the Abstract.*

THE abstract of each deed or instrument should in the first place be read.

It should next be ascertained, that the deed has the circumstances which give to its language the effect which that language imports to bear ; namely, that it is executed by the material parties, and if any particular mode of execution was required, then, as far as that mode of execution is material, that it was observed. For unless the deed be executed by the persons whose language it imports to express, it is, as far as respects the persons who have omitted to [\*275] execute the deed, to be considered at law, \*whatever equity may arise from particular circumstances, as a dead letter.

For instance, if a deed import to be the grant of *A* and of *B*, and it is executed by *B* only, it must be read and considered as the deed of *B* ; and as not having any operation whatever against *A* ; so that the title must be carried on under this conveyance, as a conveyance by *B* alone. This is also a rule, as to the declaration of the uses of fines, &c.

And in regard to deeds delivered as *escrows*, to be delivered with effect upon conditions to be performed, care should be taken that the conditions have been performed, and that the second delivery has taken place ; so that the writing has become operative as a deed.

On this subject, when necessary, the title, *facts*, *escrow*, &c. are the proper heads to be consulted.

The learning of *escrows* was fully considered in *Jennings v. Bragge*, cited 3 Rep. 35, and *Periman's* case, 5 Rep. 84, and is collected in Shep. Touch. p. 56, 57. It is a learning which might with great propriety and convenience be applied in practice more frequently than has in modern times been usual. The knowledge that relief may be obtained in equity, when the conveyance has been executed, but the price has not been paid, or when any other stipulation has not been performed, has rendered professional [\*276] gentlemen less solicitous than they otherwise \*would be in allowing deeds to become perfect, while the purchase-money, &c. remains unpaid, or other stipulation remains unperformed.

Also, care should be taken that every deed purporting to be executed by a party, is duly attested as to its execution.

This is particularly important in modern deeds ; and the want of such attestation ought to be considered as rendering it necessary, that there should be a new attestation by the witnesses, if living ; and if they be dead, there should be a further conveyance from the

parties, as to whom there is not any attestation, or there is not a sufficient attestation ; or by those who represent them.

But as to ancient deeds, in which the possession has been held, according to the purport of the deed, so that, in the language of the present day, the deed proves itself, or more correctly speaking, possession, according to the import of the deed, is evidence of the due execution of the deed ; then the want of such attestation does not raise any objection to the evidence of the title. The execution would be presumed on the evidence of possession.

Also, in deeds made in pursuance and in exercise of a power, and which, by the terms of the power must be executed in some particular mode, or attested by a given number of witnesses, care should be taken that the ceremonies of execution and of attestation were observed.

\*In this instance the language of the power is to be considered as a law, which the parties have prescribed to themselves, and as excluding the application of the general rules of law. [\*277]

When a deed is required to be under hand and seal, it is not sufficient that it should be sealed and delivered, as in ordinary cases, but it is requisite that it should be signed by, or in other words be under the hand of, the party.

This also is the case when the deed, &c. is required to be signed, sealed, and delivered ; it must be signed ; also sealed ; also delivered.

And although, by the rules of the common law it is not of the essence of a deed that there should be any subscribing witnesses, and in all ordinary cases of deeds one subscribing witness is sufficient, yet, when a power requires that the execution should be attested by two or more witnesses, there must be an attestation by that number ; and if they are required to be of a given description, as *peers*, or not to be of a given description, as *menial servants*, these requisites must be complied with, and the fact should be in some mode ascertained, if the transaction be of a recent date.

In this place also, it may be observed, that it is not sufficient, that the deed itself should internally, and by its own language, express the mode of execution, or the mode of attestation.

These circumstances of execution and attestation, must appear as substantive and external facts ; and the attestation, and not the deed, must evidence the necessary facts. [\*278]

The attestation must also specify the facts required to be attested, namely, signing, sealing, or delivery, or all or any two of these facts that the power requires.

Though the ordinary form of attestation merely contains the words, sealed and delivered, by, &c. ; yet, when a power requires that a deed, made in exercise of a power, should be under hand and seal, or be signed, sealed, and delivered, and be attested by two, or any other given number of witnesses, and the attestation is, in construction, to be applied to the signature, &c. ; the deed cannot be considered as duly attested, unless the attestation express the fact

that it was signed, as well as sealed and delivered ; and many titles depending on powers were open to objection in consequence of this omission.

Before this question was decided, some conceived that the fact of signature might be supplied in the attestation by the witnesses at any time ; and the general opinion now is, that this might be done in the life-time of the appointer and appointee ; and before any circumstance has taken place by which a change has been made in the circumstances of the title ; for instance, before the power has been released, determined, extinguished, or the like.

[\*279] For the power is to be considered as not \*executed till the moment when the attestation is complete. *Hawkins and Kemp*, 3 East, 410, appears to be an authority to warrant this conclusion.

Some powers merely require the instrument exercising the power to be under hand and seal, or signed, sealed, and delivered, without making attestation an essential ceremony in the execution of the power.

In a case of this description, the want of attestation is no otherwise material than the want of attestation of any ordinary deed ; but the fact of due execution, when the deed is signed, &c. may be presumed, as in ordinary cases, from long possession, consistent with the deed.

It is to a case of this description that Lord *Eldon's* observations in *M<sup>c</sup>Queen v. Farquhar*, 11 Ves. 467, were applied.

This was admitted by his lordship in the case of *Wright v. Wakeford*, 17 Ves. 454. The observation towards the conclusion of the judgment in *M<sup>c</sup>Queen v. Farquhar* was too general and incorrect. The Chancellor has himself made this criticism on the report. The passage must be read as applicable to the particular case before the court ; a case in which attestation was not an essential circumstance to the valid execution of the power, consequently it is not to be applied to those cases in which attestation is necessary to the valid execution of the power. The opinion of Lord

*Eldon*, as collected in the more recent case of *Wright* [\*280] \**v. Wakeford*, was, that the want of attestation to a deed, made in exercise of a power, requiring to be attested, could not be supplied by any intendment contrary to the evidence of the deed, by which it appeared that no attestation of the fact of signature had been made on the deed in the life-time of *all* the parties. The fact in that case was, that *after the death* of one of the parties, and after the title had been questioned for want of due attestation, the subscribing witnesses to the deed added a new attestation of the facts of signing, sealing, and delivery. Lord *Eldon's* opinion evidently was, that this was not sufficient ; and he even hinted, that the attestation must be a cotemporaneous act ; a proposition which is very questionable.

It is necessary, however, to add, that the three puisne judges of the common pleas certified to the same effect. Their language is,



“And we are further of opinion, that the attestation required to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing the writing, testifying the assent and approbation of *Thomas Wood* and his son; such being the usual and common way of attesting the execution of all instruments requiring attestation, which, we think, the parties creating the power had in their contemplation, and intended, and not an attestation to be written at a distance of time, after all the parties had \*testified their [\*281] assent and approbation.” While, in *Doe v. Beach*, 2 Maule and Selw. 582, Lord *Ellenborough* observed, “It is not necessary to enter into the question, at what precise time an attestation must be made.”

The point arising in *Wright v. Wakeford* was referred to the court of common pleas, and was in that court treated as a point of no difficulty; and the judges were at first disposed to view the objection to the title as altogether unfounded. After some consideration they began to doubt: In the result, Chief Justice *Mansfield* certified his opinion in favour of the execution of the power; and the remaining three judges certified their opinion to be, that the power was not duly executed. 4 Taunton, 213.

The Chancellor by his decision sustained the objection against the title.

This decision, and the alarm which it excited in consequence of various titles exposed to the like objection, and the wishes of the profession, led the writer of this essay to propose a bill in parliament, intituled, “An Act to amend the law respecting the attestation of instruments of appointment and revocation, made in exercise of certain powers in deeds, wills, and other instruments;” and after various alterations, it passed into a law, 30th July 1814, being an act of 54 Geo. III. c. 168.

The act recites, that “Whereas powers, authorities, and trusts, were in many cases required to be executed by deeds or \*instruments, signed by or under the hands of the persons executing the same, or that persons consenting to or directing acts respecting such powers, authorities, and trusts, are frequently required to signify such consent or direction, by deeds or instruments signed by them, or under their hands; and that it had been the ordinary practice in the memorandum of attestation of deeds, to express the facts of sealing and delivery only; and that doubts had arisen respecting the validity of deeds or instruments so attested, and requiring signature, although the same might have been actually signed by the persons whose signature was required thereto, and the titles of many purchasers, and of other persons claiming under such instruments, might be defective for want of the insertion of the word ‘signed,’ or some word to that effect, in the memorandum of attestation thereof; and that it was expedient that the titles of purchasers and other persons should not be disturbed merely on account of the

“omission to express the fact of signature, in the memorandum  
 “of attestation of any such deed or other instrument already  
 “made.”

And it was enacted, *first*, that every deed, or other instrument *already made*, with the intention to exercise any power, authority or trust, or to signify the consent or direction of any person whose consent or direction might be necessary to be so signified, [\*283] should, (if duly \*signed and executed, and, in other respects, duly attested,) be, from the date of that act, and so as to establish derivative titles, if any, of the same validity and effect, and no other, at law and in equity, and proveable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto; and the attestation of the witness or witnesses thereto, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof or the presumption of signature.

*2dly*, That the act should extend and be construed to extend to all deeds, and other instruments, *already made*, in exercise of powers, authorities, and trusts of sale, exchange, partition, selection, nomination, discretion, leasing, jointuring, raising portions, and other charges, and for appointing new trustees, and other powers, authorities and trusts whatsoever; or made for evidencing assent, consent, request, direction, or any other like circumstance, in reference to the execution of any such powers, authorities or trusts: with a proviso, being § 3, that this act should not extend nor be construed to extend to revive or give effect to any appointment, revocation, or other assurance theretofore made, as far as the same had been avoided by entry or claim, or by suit at law, or [\*284] in equity, or by any other legal or equitable \*means whatsoever; nor should the act affect or prejudice any suit at law or in equity then depending, for avoiding any deed or other instrument of appointment, revocation, or assurance; and that if any person who had made any such entry or claim, or who had brought any such suit, or had defended any suit for the purpose of avoiding any such appointment, revocation, or other assurance, should release the benefit of the same entry, claim, suit, or defence, within six calendar months next after the passing of that act, then such entry, or claim, or suit, or defence, should not prejudice or avoid any such appointment, revocation, or other assurance; but every such appointment, revocation, or other assurance, should be and remain in force under that act, as if no such entry or claim had been made, or suit brought or defended: with a further proviso, being § 5, that nothing in that act contained should extend or be construed to extend to affect any question respecting any instrument not within the provisions of that act, and which might want any formality in the attestation of any witness or witnesses thereto; but such instrument should have the same force and effect as it might have had if that act had not been made.

It will be observed, 1st, that this act cures no other defect than the want of attestation of signature :

And 2dly, it is retrospective only, and not in any degree prospective; thus it has not cured \*any defect arising from [\*285] the want of signature, or the want of attestation of any other fact than signing, as the want of attestation of sealing, or of delivering; nor is it applicable to any deed, or other instrument of a date subsequent to the 30th day of July 1814, being the day from which the act had its operation.

So that the decision in *Wright v. Wakeford* is the law of the present day, as applicable to all deeds, &c. executed under powers which required attestation of signature, and have been executed even by signature, but have omitted a specification of the fact of signature in the attestation.

The case of *Wright v. Wakeford* has been followed by the cases of *Doe d. Mansfield v. Peach*, 2 Maule and Selwyn, 276. *Doe d. Hotchkiss v. Pope*, 2 Marshall, 102.

In all these cases the decision has been uniform, that the attestation must express the fact, be it signing, sealing, or delivery, which is required to be attested.

It seems also to follow that the attestation must also specify by whom the deed, &c. made in exercise of such a power, is signed, sealed, or delivered; since without such specification it would be necessary, contrary to the intention of the author of the power, to resort to extrinsic evidence, to supply the evidence of that fact.

Titles of this description also admit of many different varieties of circumstances, and consequently conclusions.

\* 1st, When attestation is not required, the fact of signature [\*286] may be proved by the witnesses, or it may be proved *aliumde*; also, after a great length of time has elapsed, and if the deed appear to have been signed, the presumption of signature may be relied on, since a jury would consider the signature as having taken place at the time of sealing and delivering.

2dly, In many instances also, even where attestation is required by the power, the deeds may be good in equity, on the ground of *contract*, and of the price paid, although the deeds may be inoperative at law; but when a married woman attempts to execute a power, requiring attestation, and no attestation exists, doubts may be entertained whether there be any equity in favour even of a purchaser; since it is difficult to understand how a married woman may be bound, even in equity, by any contract which is deficient in those circumstances by which her power of contracting is created; for she is, even in equity, considered as a *feme sole*, or personable to contract, so far only as she is qualified by her power, and she pursues the power.

In other cases, the deeds made in the execution of the power may be lost, and then the general rules of presumption, and particularly the rule, *omnia præsumuntur, rite and solemniter acta*, will.

in cases of possession consistent with the deed, equally apply to deeds prepared under powers as to ordinary deeds; and a [\*287] jury \*would, in the absence of all evidence, be directed to presume, that the deed of appointment, of which secondary evidence is given was duly attested, as well as sealed and delivered.

One of the many objections against a reliance on abstracts, which take recitals for the evidence of deeds, wills, &c. is, that the external circumstances of execution and attestation seldom or ever appear by recitals; and of course it is not certain that the deed or will was duly executed and attested; or, even though the facts should be recited, they are seldom recited in any other manner than as the language of the deed, while the more correct mode would be; and this mode is now becoming general in practice; to give the recital of the execution and attestation as a substantive fact, alleged from the evidence of the transaction, when the recital is of a deed made in execution of a power.

Such recital may be to this or the like effect: *Whereas, by indenture, &c. bearing date, &c. made, &c. and being under the hand and seal of, &c. and signed, sealed, and delivered by him, in the presence of two witnesses, and attested by the same witnesses.*

Also when a deed requires enrolment, either by positive statute law, or by the provision of a power, it is the duty of the conveyancer to see, or at least to inquire, whether the deed has been so [\*288] enrolled, and whether the enrolment was \*made in due time, if time be material in reference to the enrolment.

Respecting the period within which enrolment is to be made, the following observations may be of use;

1st, A bargain and sale of an use, under the statute of uses, 27 H. 8. c. 10, must, in conformity with the statute of enrolment, 27 H. 8. c. 16, be enrolled within six lunar months from the date; and the date is computed from, in other words, exclusive of, the day of the date, and inclusive of the last day of the six months. So that the indenture of bargain and sale must be enrolled on or before the 168th day after the day of the date of that indenture.

By the date must, in this case, be understood the day of the date, and not of the delivery, except a deed has no date; and in that case the computation must be from the delivery: and although the day of the date of the deed be not taken into the computation of the six months, an enrolment on the day of the date will be good; and such bargain and sale will be valid, although the enrolment take place after the death of both or either of the parties, provided the indenture be enrolled within the limited time; and no act done by the bargainor without the concurrence of the bargainee, in the intermediate time between the bargain and sale and the enrolment, will affect or prejudice the interest of the bargainee, so as the deed be enrolled in due time.

[\*289] \*2dly, Bargains and sales of real estate, under the bankrupt laws, must be enrolled; but as to any other estate or

interest of the bankrupt, besides an estate tail, there is not any limited time for the enrolment. It is immaterial whether the ordinary bargain and sale be enrolled before or after the expiration of six months, or in the lifetime of the bankrupt, or after his death : but it should seem, that in compliance with the general principles of law, it must be enrolled in the life-time of the bargainees, or of one of them.

Under bargains and sales from commissioners of bankrupt, no estate passes till enrolment. The commissioners have only an authority to bargain and sell by deed indented and enrolled. No estate is in them ; and their authority is not exercised till all the circumstances under which it is to be performed, are complete.

But by the statute of 21 Ja. I. c. 19, s. 12, bargains and sales of real estate of a bankrupt, of which he is tenant in tail, must, for the purpose of barring the heirs in tail, and those in remainder and reversion, be enrolled within six lunar months.

In this instance also no estate passes till the enrolment.

Suppose a bargain and sale, and the six months to elapse before enrolment, yet it is reasonable to suppose that another bargain and sale by the commissioners, and enrolled within six months, would be effectual to bar the entail.

\*This is a point open for decision. Should the bankrupt [\*290] be dead, then it might reasonably be objected that the authority of the commissioners to execute a bargain and sale to bar entails had ceased.

The observations respecting enrolment in the life-time of the grantee, are applicable to bargains and sales under various other acts of parliament ; as the land-tax acts, inclosure acts, &c., in which enrolment is required, as an essential part of the deed by which a power, or rather an authority, is to be exercised.

And when an enrolment is required to be made within a *limited* time, the deed will, at least as to its legal, as distinguished from its equitable operation, be void, unless the enrolment take place within that time.

Also, when a deed is required to be enrolled under the express provision of a power, in a private conveyance, the deed must be enrolled in the mode prescribed by the power, viz. within a given time, if a particular time be limited ; and in a particular court, if any court be prescribed.

And if a time be limited within which the enrolment shall be made, the enrolment must take place within that time, or be of no avail ; and if no time be limited for the enrolment, the law requires the enrolment to be in the life-time of the parties ; and, it is apprehended, of the appointees as well as of the appointer. See *Hawkins v. Kemp*, 3 East, 410.

\*From the preceding observations it will be collected that [\*291] different circumstances impose a different regulation in this particular.

The case of *Hawkins v. Kemp* is sometimes considered as turning

on the point, that the act of enrolment was in some measure a *personal* act, to be done by Mr. Hawkins, so far, that it was necessary to take place in his life-time, and did not admit of perfection after his death.

And it should seem that if the power allow a limited time for the enrolment, the appointment will be sufficient, if the deed be enrolled within that time, notwithstanding the death of the appointer or appointee in the interval between the date of the deed and the enrolment.

This was the more prevailing opinion in *Hawkins v. Kemp*.

It is observable also, that in appointments under powers, except in particular cases, arising from the special language of the power, no estate arises till enrolment. *Hawkins v. Kemp*. *Digge's case*, 1 Rep. 123.

And the appointment may be defeated by an act done by the owner of the power, by which he has extinguished the same, while *in fieri*. *Digge's case*.

Also when *livery of seisin* is essential to the conveyance, as in the instances of feoffments, leases, or other grants at the common law, of estates of freehold, of lands held in possession, (for leases for lives in exercise of powers may be, indeed ought to be, [\*292] made \*without livery,) it is necessary to see that livery was made in the life-time of the feoffor and of the feoffee, or of the lessor and of the lessee. 1 Inst.

And when livery is made, as it may be by attorney, then care is to be taken that the attorney had an authority for the purpose, and that such authority was conferred by deed, and that it has been duly pursued.

If livery be made by the feoffor, or to the feoffee in person, it must, *ex ut termini*, be in the life of the person making, or of the person receiving, livery. The cases which suggest inquiry are those in which livery is made or accepted by attorney, or by or to the *heir* as such.

Many nice distinctions arise between livery in person, and livery by attorney; and the general learning of livery of seisin should be studied under the doctrine of feoffments.

But in regard to ancient deeds, under which the possession has been held, consistently with the deeds, for thirty or forty years, it is reasonable to presume that livery was made according to the deed, although there be not any direct evidence of the livery. A jury would most unquestionably presume the livery. 1 Vern. 195.

When livery is made or accepted by attorney, the instrument which created the authority ought to accompany the title deeds, or be within the power of the purchaser; and it is to be [\*293] \*shown that the feoffor was living at or after the time of livery by his attorney; so as to the feoffee, if he accepted livery by attorney. It should be seen that the letter of attorney was by deed, for this is essential, and that it contained language which authorized the act which has been done under the power as-

sumed. As an exception to a general rule, an infant may appoint an attorney to receive livery of seisin for him, as feoffee. 1 Roll. Abr. 730, l. 10. *Palfreyman v. Grobie*.

It is also observable, that without express words in a power, the power cannot be executed through the medium of an attorney; thus an attorney cannot execute a lease under a power to lease; *Combe's case*, 9 Rep. 77; or give consent to a revocation of uses, although no discretion be confided to him, *Hawkins v. Kemp*, 3 East, 410; nor surrender copyholds under an authority to executors to sell, 9 Rep. 77 b.; or surrender copyholds on behalf of a married woman; still less, (except under the provisions of the act of 47 Geo. III. sess. 2, c. 8,) suffer a recovery on her behalf. In short, an attorney cannot be appointed to do an act which is *personal* to the person who assumes to give the authority.

Deeds to be executed by attorney should be in the name of the principal, (*Combe's case*, 9 Rep. 77 b.) and not of the attorney. They should be executed as the act and deed of the principal, either in form or in substance. The \*signature [\*294] should be with the name of the principal, rather than with the name of the attorney; but an inaccuracy in the latter particular would not vitiate the deed. The reason is obvious; signature is not of the essence of the deed.

While writing these observations, one of those frauds which occur in practice, has been under consideration.

An attorney sold under an authority which conferred a power of leasing, not a power of sale. Several years elapsed before the defect was discovered, and many intermediate conveyances from purchaser to purchaser had taken place. At last the defect was discovered.

To give a colour to the title, a formal letter of attorney was prepared to the same person, though he had paid the debt of nature. It was dated prior to the conveyance which the attorney had executed, as if the date would give relation to the authority, so as to effectuate the conveyance already made.

But the inaccuracy of the transaction was easily detected; first, by the stamp to the letter of attorney; and secondly, by the watermark on the paper, showing the year of its manufacture; and each of these circumstances afforded the means of impeaching the internal evidence of the deed.

It is by attempts of this nature that transactions in which similar fraud has not been practised, are scrutinized with a severity which is the only safeguard against fraud.

\*Were it not disgusting to detail such transactions, [\*295] another fraud actually committed, and which at this moment is vexatious to a large body of purchasers residing in a village near the metropolis, might be stated as a defence, were any defence necessary, for the strict scrutiny with which titles are investigated.

Formerly an *attornment* was essential to the validity of some deeds, as grants of reversion, &c.; and no estate passed till attornment. The reason assigned by Lord Coke is, "Every grant must take

“ effect as to the substance thereof, in the life of both the grantor and the grantee.” 1 Inst. 309 a. And he adds, “ In this case, if the grantor dieth before attornment, the seignory, rent, reversion, or remainder, *descend to his heir* ; and therefore after his decease the attornment cometh too late. So likewise if the grantee dieth before attornment, an attornment to the heir is void, for nothing descended to him ; and if he should take, he should take it as a purchaser, where the heirs were added, but as words of limitation of the estate, and not to take as purchasers.”

But unless the attornment was essential to the operation of the grant to pass the estate, and although there could not be any distress till attornment, (as in the instance of a fine, or bargain and sale by a conusee in a fine, before the conusee had obtained attornment) then the conveyance would remain in operation, [\*296] \*notwithstanding the death of the grantor or grantee before attornment. 1 Inst. 309 b. Even in the instance of a manor partly in demesne, and partly in services, and a feoffment of the manor, the services do not pass till attornment ; so that the manor might have been destroyed by a severance of the demesnes from the services, by the death of the grantor or grantee before attornment. This had been a disputed point. 1 Inst. 310 b.

The necessity of attornment is now superseded by the statute of 4 and 5 Anne, c. 16, for the amendment of the law.

And as often as any difficulty arises from the absence of direct evidence of livery of seisin, the attention should be directed to consider whether the deed might not have operated as a grant of the reversion or remainder expectant on a term for years, or some other particular estate. Even an estate at will or by copyhold tenure will be sufficient to lay a foundation for a deed of grant, as an efficient conveyance at the common law ; and it is obvious, that when there are a lease and release, as parts of the same assurance ; or when the grantee has an estate capable of enlargement, as in the case of every particular tenant, even of a tenant at will, a copyholder ; or a person holding the possession as a mortgagor, by the permission of the mortgagee ; or as a tenant at will to him, the want of evidence

of livery of seisin does not afford a solid ground of objection [\*297] \*against a title, provided the facts admit of proof, or the circumstances of the case afford a presumption supplying the place of proof. Thus, by reason of farm or occupation leases, or of outstanding attendant terms, few titles are defective for want of evidence of livery of seisin, or enrolment of a bargain and sale, or a lease for a year, as part of the assurance by lease and release.

On a late occasion, a very valuable estate in the neighbourhood of the metropolis was protected from eviction by resorting to the learning of grants. In that case, the issue in tail claimed the inheritance, on the ground that a recovery was defective for want of a good tenant to the writ of entry. The tenant to the writ of entry had been made by a deed intended to have been enrolled, and to have operated as a bargain and sale, under the statutes of Hen.



VIII. ; but by some strange neglect, no enrolment had taken place ; and the title was supported by resort to an outstanding term for years, and to the estates or interests of copyholders, as the means of enabling the deed to operate as a grant of the remainder or reversion dependent on a particular estate.

Many useful observations on this point will be found in the chapter on lease and release in the second volume of the Practice of Conveyancing.

In some cases, an *entry* is necessary to complete the title, as in the cases of *exchange* at \*the common law, of lands in [\*298] possession to give an actual seisin, &c. ; to convert an *interesse termini* into an actual term ; and sometimes to revest an estate, or to restore the seisin, as in the case of an entry after a disseisin, &c. or a condition broken ; and whenever the fact of entry is material to the title, there should either be direct evidence of it, or it should appear to be capable of some proof, within the power of the purchaser ; or the circumstances of the title should be such as afford an irresistible presumption that an entry was made.

It is to be remembered, that a bargain and sale for years gives an estate immediately on the execution of the deed ; while a demise at the common law of lands in possession, requires an entry to gain a term separated from the inheritance.

Important consequences used to arise from this distinction. In modern practice, it generally happens that the deed can be used as a bargain and sale for years.

When the deed appears deficient in any of these circumstances, it becomes material to consider whether it cannot operate in some other mode ; for instance, whether it may not operate as a covenant to stand seised to uses, though it cannot have the effect of a feoffment, or grant, or bargain and sale ; whether it may not operate as a grant in fee, though it is void as a bargain and sale in fee, or as a feoffment ; also, whether it may not operate under the \*ownership, though it cannot be supported as an exercise [\*299] of a power ; and whether it may not operate as a bargain and sale for years, though it was inoperative, at least for a time, and in point of estate, as a demise at the common law.

By giving this application to the evidence of the title, a difficulty which otherwise would have existed will frequently be obviated. On this subject, the case of *Roe v. Transer*, 2 Wilson, 75 ; Willes, 682 ; Shep. Touch. p. 80, deserves to be consulted.

Also in modern deeds, if a pecuniary or other consideration be the motive for the deed, care should be taken that the receipt has been signed for this consideration.

The acknowledgment of the receipt in the body of the deed, except in the instance of the acknowledgment *by recital*, that the money was paid at some former period, will not be deemed sufficient. In equity, the receipt indorsed on the deed is considered, as has already been observed, to be the material evidence of the application of the money ; and the want of such receipt is implied

notice that the purchase money has not been paid ; and in deeds which are questionable on the ground of fraud, the party will be required to prove the actual payment of the consideration. Hence it is, in practice, of advantage to make the payments, as far as circumstances will admit, through the intervention of bankers, since their books will afford evidence of the transaction.

[\*300] \*Trustees in particular should make all their payments, and accomplish their receipts through the direct agency of bankers.

Although a bargain and sale of an use cannot be made without a consideration of money or money's worth, as its foundation, yet on the other hand the payment of a pecuniary consideration may be averred and proved, although it be not expressed in the deed ; and if the consideration be expressed in the deed, then, for this purpose, the fact of payment cannot be controverted. The internal evidence of the deed is conclusive that there was a pecuniary consideration to support the deed as a bargain and sale.

The case of the *Churchwardens of St. Saviour, &c.* 10 Rep. 67 b. treated this point as clearly settled.

But these authorities do not deny the necessity of proving the payment, in order to rebut the equity of a vendor ; or when it is necessary to support the deed against an imputation of fraud on creditors, &c.

Also, in deeds made in pursuance of powers which require that other lands of equal or greater value should be settled, &c. as a condition, either in law or in equity, precedent to the execution of the power, care should be taken to see that the settlement required by the power has been made ; and in some cases it will be necessary

to go farther, and ascertain the value of the lands ; and also [\*301] to investigate the title to the lands which have been settled or given in exchange.

The observations respecting the application of the purchase-money suppose that no provision has been made to dispense with the necessity of attention to these particulars ; or that the lapse of time, or acquiescence by all persons who were beneficially interested, has not superceded the necessity of inquiring into these points.

Provisions to dispense with inquiry into the fact of application of the purchase-money, are attended with great convenience, and are found in most well-prepared instruments.

Also in common law exchanges, in which the object is to have the identical lands, it is an incumbent duty to investigate the title to the lands which are purchased, and also to the lands given in exchange ; since a defect of title to either class of parcels, or to any part of the lands of either class, will expose the purchaser to the danger of eviction.

Also, in titles which were formerly of copyhold tenure, and which have been converted into freehold tenure by enfranchisement, it is usual to investigate the title under the copyhold tenure, and also the title of the lord under the freehold tenure ; since a defect in the title under the copyhold tenure would not, as against a stranger, be cured by enfranchisement.

Where the copyhold tenure is extinguished \*in the free- [\*302] hold tenure, there is, as principle would suggest, an acceleration of the right of enjoyment under the freehold tenure, in the same manner as when a term of years merges in the freehold or inheritance ; and the encumbrances on the freehold or inheritance take effect in possession.

A contrary doctrine has been advanced ; and there is, it is believed, a decision to that effect, though frequent research has not discovered the case ; but the principle on which this doctrine is maintained is not easily discovered ; for when the copyhold estate ceases, the estate under the freehold tenure must take effect in possession ; and conveyancers have uniformly acted on such acceleration, and often guard against it by creating a term of years out of the copyhold tenure, prior to the enfranchisement, that the title to the possession may depend on that tenure.

Indeed, it is difficult to find any principle of law under which a person whose title to lands, formerly of copyhold tenure, depends on enfranchisement, could, after an extinguishment of the copyhold tenure, protect himself from charges affecting the freehold tenure.

There is not any analogy between this case and a release of services by a lord of the manor, or other seignory, to the person who is tenant under the freehold tenure.

The tenant of the freehold tenure has a \*fee-simple ; [\*303] while a copyholder, though he has a fee by custom, is, in respect of the freehold tenure, merely tenant at will.

So when the lord purchases the copyhold tenure, and that tenure becomes extinct by union with the freehold tenure, it is unquestionably necessary to investigate the title under the copyhold tenure, as well as under the freehold tenure ; but, in this instance, there is not the same danger, that encumbrances affecting the copyhold tenure would be accelerated.

Also, when the tenant under the freehold tenure obtains a release of the services from the lord, and there is a rent ; in this instance the rent will be extinguished ; but as the encumbrances of the lord cannot affect more than the rent and services, the title of the lord is not deemed of importance, unless the services be of considerable value, to call for the production of evidence of the title of the lord. A sound discretion, setting a boundary to inquiries of this description should be exercised.

When, however, a title to freehold lands is released from a fee farm rent, or rent charge, of considerable amount, it would be extremely imprudent to forego the caution of ascertaining that the rent has been released by persons who were competent to release the same.

Every partition between coparceners implies a warranty corresponding with the warranty on an exchange. This point, duly considered, leads to the conclusion, that when a title depends on \*a partition between coparceners, the title to all [\*304] the lands comprised in the partition, as well as to the iden-

tical lands which are purchased, ought to be taken into consideration ; but this is not generally done.

In this place also, it may be noticed, that if a fine or common recovery be levied in the courts of Westminster-hall, of lands of the tenure of *ancient demesne*, these lands become, while the fine or recovery remains in force, frank fee ; and the title will be involved in considerable difficulties, until the lands are restored to the tenure of ancient demesne, or are discharged by the lord from the services to the court of ancient demesne, and are in point of title, as well as in point of fact, become of the tenure of frank fee ; in other words, of socage tenure.

In cases of this description it is also expedient to investigate the title of the lord of the manor of ancient demesne, before reliance can be placed on a release which imports to have discharged the lands from the tenure of ancient demesne ; for it is at least doubtful, whether the lord of the manor can make the lands frank fee in point of title for any longer period than his own estate ; and if he cannot (and it should seem he cannot) then the abstract ought to show a title in the lord to discharge the lands from the tenure of ancient demesne.

These are the only observations which are particularly [\*305] important to be noticed in regard \*to the external parts of a deed, and the circumstances arising as incidentally connected with the subject.

The next object to be attended to is the *form and operation of the deed itself*.

#### *Of the Form and Operation of the Deed itself.*

UNDER this head, it will be necessary to consider the act intended to be done ; whether that which the deed imports to do is regularly done in point of form ; and whether the parties were competent to do the act in point of estate, and in point of discretion, freedom from coverture, &c.

The line of conduct to be adopted is to consider the particular deed in the first place, *per se*, and in the second place, relatively to the title.

The first object is to attend to the form of the deed, and see

1st, That it is made in the mode proper to attain the end proposed ; for instance, that if a feoffment be requisite, it assumes the form, or has the ceremonies, of a *feoffment*, and consequently, that livery of seisin is made.

2dly, That if it cannot operate as a feoffment, it may operate as a lease and release, and consequently that there is a lease for a year on which the release is grounded ; or, if it cannot operate either as a *feoffment*, or as a *lease and release*, that it may operate as [\*306] a *\*bargain and sale enrolled*, and consequently, that the deed is founded on a consideration of money or money's worth ; and that it has been enrolled in the proper court, and

within the limited time ; and that if it cannot operate in either of these modes, it may operate in some other mode, by construction of law, as a *covenant to stand seised to uses*, and consequently that it is founded in the whole, or in part, on the consideration of blood or marriage ; or that it may operate as an *appointment* ; and consequently that there was a power as its foundation.

These observations apply to lands held for an estate in possession ; but if an estate in reversion or remainder in lands be the subject of the deed, then it is to be considered whether the instrument can operate as a grant, and consequently as to estates in remainder or reversion, it is necessary to ascertain that there was a previous subsisting particular estate which conferred a right to the possession, so that there existed an estate in reversion or remainder, divided from, and expectant or depending on, an estate in possession.

Also, if the conveyance be to uses, care should be taken to see that the conveyance was effectual at the common law ; and consequently that there was a seisin to supply the uses ; and when the conveyance is to be supported only as a bargain and sale of the use, or a covenant to stand seised to uses, then the \*at- [\*307] tention must be directed to see that the instrument might operate as a bargain and sale, or gift of the use, by force of the statute of uses, under the seisin of the former owner, without any conveyance by him ; and, consequently, that in a bargain and sale there is a valuable consideration of money or money's worth ; and that in a covenant to stand seised to uses, the consideration of blood or marriage existed.

Also that the conveyance is such as in its nature admitted of a declaration of uses.

The following distinctions will deserve attention in this place :

An use cannot arise out of an use, or in other words, an use declared of a seisin, which arose from an use executed by the statute of uses, will not be executed by that statute. For the statute executes those uses only which are in the first degree, and not uses in the second degree. The latter uses are mere trusts or beneficial interests, and confer equitable estates only.

The following examples will illustrate and show the application of these observations :

A bargain and sale to *A*, to be executed by the statute of uses, gives *A* an use. Therefore a bargain and sale to *A* and his heirs, to the use of *B* and his heirs, gives *B* merely an equitable estate ; for, as the bargain and sale passes an use to *A*, this is the use in the first degree, and will be executed by the statute. The ulterior \*use to *B* is an use in the second degree, and there- [\*308] fore a mere trust.

But a bargain and sale under an authority in a will, or under a power in acts of parliament, as the land-tax acts, &c. passes a common law seisin, and a bargain and sale thus made to *A* and his heirs, to the use of *B* and his heirs, passes a seisin to *A* and his

heirs, and the use to *B* and his heirs will be executed by the statute. In this instance *B* has the use in the first degree.

Also observe, that a conveyance to *A* and his heirs, to the use of *A* and his heirs, gives to *A* a seisin wholly by the rules of the common law; since *A* could not prior to the statute be a trustee merely and solely for himself.

As the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate, Lord *Bacon*, in his *Reading on Uses*, (p. 63,) gives this rule, and observes, "therefore, the statute ought to be expounded, that "where the party seised to the use, and the *cestui que* use is one "person, he never taketh by the statute, except there be a direct "impossibility or impertinency for the use to take effect by the "common law."

But under a conveyance to *A* in fee, to the use of *A* for life, remainder to *B* in fee; or to the use of *B* for life, remainder [\*309] to the use of *A* in fee, the use in favour of *B*, and also the use in \*favour of *A* for life, but not the use to *A* in fee, will be executed by the statute.

And under a conveyance to *A* in fee, to the use of *A* in fee, to the use of *B* in fee, *A* will be seised by the rules of the common law, because the express declaration of use in favour of *A* renders the use declared in \*favour of *B* repugnant; and for that reason the use to *B* is considered merely as a trust.

Even when a conveyance is to *A* in fee, to the use of *A* in fee; a clause may be introduced which will cause the conveyance to operate as to the uses, or at least some of them under the statute of uses; for instance, if a power be added, that another person may create a jointure, or make leases or sales, exchanges, &c. such powers will be good; and when they are exercised they will give estates, through the medium of the statute of uses. So if a limitation be introduced to give the grantor an estate for life, either absolutely, or on an event, this addition would render it necessary that the use to the grantor should arise under the statute of uses. *King v. Inhabitants of Easington*, 4 Term Rep. 177.

In all those instances in which the uses arise from the common law seisin of *A*, the uses are to be executed by the statute; and if they are consistent with the use declared to him in fee, he will retain the fee as part of his common law seisin. But when his fee is modified by, or subjected to, any power, or to any shifting or [\*310] \*springing use, then, on account of this new quality, not warranted by the rules of the common law, even the use limited to *A* in fee will be subject to the operation of the statute.

Also, an appointment under a power in and arising under a conveyance to uses, passes the use itself, and not the seisin; and therefore, under an appointment to *A* in fee, to the use of *B* in fee, or to the use of several persons for particular estates, the statute executes the use in *A*, and the ulterior uses are merely trusts, in other words, are uses on uses.

But shifting or substituted uses are not uses on uses, and do not fall within the scope of the observations applied to uses bearing that character; for these shifting or substituted uses are merely alternate uses, and not uses upon uses. For this reason, a conveyance to *A* in fee, to the use of *B* in fee; and if *C* should pay a given sum within a limited time, then to the use of *C* in fee, gives a common law seisin to *A* to the use of *B*; and this use will be executed in *B*, by the statute of uses, subject to the shifting use declared in favour of *C*; and if the money should be paid within the particular time, this use declared in favour of *C*, unless defeated in the mean time, will also be executed by the statute of uses, and will over-reach, and in effect, determine the estate of *B*.

From a former observation it may be collected, that it is immaterial whether the use of substitution be in favour of the grantee of the \*seisin, or of a stranger: In either case it [\*311] may operate with effect. Also, suppose a conveyance to be made to *A* in fee, to the use of *A* in fee, with a proviso, that if *B* should pay a certain sum of money on a given day, then the land shall remain to the use of *B* in fee. On payment of this money, according to the language of the proviso, the statute of uses would be called into operation, and would vest the fee in *B*. For that reason, the use to *A* in fee would be executed under the learning of uses, as the only means by which the proviso could operate; and from the first instant, the conveyance would be, in effect and construction of law, a conveyance to the use of *A* in fee, liable to be defeated by the shifting use in favour of *B* in fee.

Within the whole scope of that learning which is more particularly to be studied by the conveyancer, there is none more important to be known than that which concerns the doctrine of uses; for there are many things which may be done through the medium of a conveyance to uses, or under the statute of uses, without a conveyance, which cannot be accomplished by a conveyance merely and simply at the common law; and consequently, there are many occasions in which it is absolutely necessary to resort to the learning of uses in framing a conveyance, or for giving it effect.

As the general outline of this learning, and the principal distinctions, are collected in the \*second volume of [\*312] the *Practice of Conveyancing*, p. 473, and in this volume, p. 101, it would be mere repetition to add them in this place.

To return from this digression on uses. But perhaps the deed in question was not intended to operate as a conveyance, but merely as a *release of right*, or as a *confirmation of title*, or as a release from one joint-tenant or coparcener to his companion in the tenancy; or, as a *release of rent*, or common, or of services, or other incorporeal hereditament; or *to create an estate*, as in the case of a lease, grant of annuity, &c. &c. or to determine a particular estate, as in the instance of a surrender; and under all and the like circumstances, the point to be considered is, whether the deed has produced the effect which was contemplated; for, although

the instrument may assume the form of a conveyance, or of a release, yet if that form was an inadequate mode of giving effect to the intention, it is next to be considered, whether the deed may not have the effect of that intention by which it was dictated, by some construction of law under the rule, "*cum quod ago non valet ut ago, valeat quantum valere potest*;" or, as the rule is more fully expressed in Shep. Touch. chap. Exposition of Deeds, in these terms, "that the construction be such, that the whole deed, and every part of it, may take effect; and as much effect as may be to that purpose for which it is made; so as when the deed [\*313] cannot take effect, \*according to the letter, it be construed so as it may take some effect or other."

Under this rule, a feoffment, a release, a surrender, a bargain and sale, a grant, or a lease, or rather an instrument in either of these forms, may operate as a covenant to stand seised to uses; and a lease in the form of a common law demise, may operate as a bargain and sale for years under the statute of uses.

A lease and release, void as such, because they import to pass an estate of freehold to commence in *futuro*, may operate as a covenant to stand seised to uses.

And when a deed may operate in either of several modes; for instance, as a lease for a year, by the rules of the common law, or as a bargain and sale for years under the statute of uses, it is in the option of the party to use it in either mode as he thinks fit.

In forming an opinion of the mode of operation, and effect of a deed, attention must necessarily be paid to its constituent parts, and care must be taken that it has all essential circumstances, and that it is good in point of law to produce a given effect; and if the effect be different at law from what it ought to be in equity, then the title must be considered as complete, so far only as respects the legal estate; and the equitable or beneficial ownership as divided from the legal estate will require a distinct consideration.

[\*314] \*Sometimes a deed, though defective in legal operation, may, by way of contract, confer a good title in equity.

In considering the form, combined with the effect, of a deed, the circumstances to which particular attention must be paid, are,

1st, That there is or are a grantor or grantors.

2dly, That the grantors were of ability to make the conveyance, in point of age, of discretion, and other personal qualifications; and also, in point of ownership or estate, that is, of title, and that they were competent to make the same by the deed, &c. under consideration.

3dly, That there is a grantee or grantees, and that the grantee or grantees was or were capable of receiving the benefit of the grant in the mode in which the grant is made.

4thly, That there are proper, or at least, effectual, words of grant.

5thly, That there is a subject to be granted, and that such subject is described with sufficient certainty, and that this certainty em-



braces the lands in question, or some of them, by an accurate, or at least, adequate description.

6thly, That the estate is well limited in point of law, and by technical words; so that the limitation is not void for uncertainty, or as contravening the rules of law, by granting an estate of freehold to commence in *future*, or by granting an estate in remainder, without any \*particular estate to support it; or [\*315] after a particular estate which necessarily must determine before the remainder can commence; or by granting a contingent remainder, without any prior particular estate of freehold to support the same; or by limiting the estate to arise on an event against law, as on committing murder.

7thly, That if the title concern a rent, such rent is well reserved, or was duly created; that if uses are declared, there is a seisin to supply these uses; or that they may arise from the seisin of a bargainor in a bargain and sale, or of a covenantor in a covenant, to stand seized to uses; that these uses are warranted by the rules of law, and not too remote, as tending to a perpetuity; and that such uses, as far as respects the legal estate, are not open to objection, as being uses upon an use; and that if trusts are declared, there is an estate in trustees to support these trusts, or a contract, which, in equity, will be binding on the ownership of the beneficial proprietor of the estate.

These are the leading points to be considered. They branch themselves into a great variety of learning, and involve all the niceties of the law which will have occurred in the progress of that course of study which has been recommended. An attempt to give even a summary view of this learning will be attended with considerable difficulty. On the one hand, to go through the subject, fully, would be to write a comprehensive treatise on all the various learning on \*real property; on the other [\*316] hand, to give merely a summary view of the subject, will render it still necessary that the student should extend his researches into books which treat of the subject at large.

Still, however, it will be right to give a short intimation of the leading points which present themselves more immediately in practice under these different heads; and to refer to the books from which more full information may be obtained.

1st, That there must be a grantor, and that he must be able to do the act in point of estate, and of ownership, and also in point of discretion.

This leads to the consideration of the abilities of persons, and also the nature and extent of the ownership conferred by particular estates.

Respecting the ability of persons:

All persons are, in point of discretion, &c. able to grant, unless they are disqualified by the circumstances of infancy, lunacy, idiotcy, duress, coverture; and even some of these persons may

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grant in some mode, and to a certain extent, although they are incapable to grant in a different mode, or to a greater extent.

So as to estates ; all owners of vested estates, except incapacitated by one of the disabilities which have been mentioned, may grant the whole of their ownership under that estate, or [\*317] create any particular estate or interest out of \*the same ; for *Cui licet quod magis non debet non licere quod minus* ; also, *cujus est dare, ejus est disponere* ; and tenants in tail may, by a particular mode of assurance, as by common recovery, bar the estates limited after and expectant on the estate tail, and enlarge their particular estate into a fee-simple.

Some owners of estates also are allowed the power of divesting the estates of other persons, so as to turn these estates into a right of entry, or into a right of action. And this right of entry, or of action, may be ultimately barred by the statutes of limitation, or by nonclaim on a fine, so as to give a good title in fee-simple. But in the mean time, till this bar is perfect, or the right is released, the title will be defective. Such alienations are wrongful, and operate by way of disseisin or deforcement.

So also an estate vested in one person may, by disseisin, abatement, or intrusion, become vested or placed in the seisin of another person.

At first such title will be defeasible ; but eventually by release, bar by nonclaim on fine, or by one of the statutes of limitation, such estate may become indefeasible.

Also an estate may be defeasible by condition, but may become absolute, either by a performance of the condition, or by a release of the condition before it be broken, or of the right of entry, or of action after such right has accrued. Also an estate may be [\*318] determinable, from the circumstance that it is \*derived out of a particular estate, for *cessante statu primitivo, cessat derivativus* ; or defeasible, because it is founded on a defective title in the person by whom the particular estate was granted ; and such defective or defeasible title may become complete and indefeasible by the release or confirmation of the person in whom the right resides.

The general and leading rule as to alienations and forfeitures is, *quod meum est sine facto meo vel defectu meo, amitti vel in alium transferre non potest* ; on the other hand, in favour of alienation, the rule is, *nihil tam conveniens est naturali æquitati, quam voluntatem domini rem suam in alium transferri ratam habere*.

But in considering titles another rule must be carried in the memory, *quod semel (Anglicè already) meum est, amplius meum esse non potest*. 1 Inst. 49. Hence a demise of the fee to an heir does not make him a purchaser ; and hence a conveyance to a person who already is the owner, must operate as a release of right, or a confirmation. It may improve, but cannot change, the title.

1st, As to infants.

Conveyances made by them by matter of record, as fine or reco-

very, are voidable, and not void ; and they must be avoided during their minority, or at least their infancy must be tried by the court, by their own inspection of the infant ; Inst. 131 a. 380 b. Styles, 472, 12 Rep. 123 ; and such inspection must take place during minority. Evidence is received \*by the court, to [\*319] assist them in the conclusion they are to form respecting the age.

And as to *common recoveries*, there is a difference whether they be suffered by the infant in person, or by attorney.

When suffered *in person*, they are voidable only by trial, viz. inspection during the period of minority. When suffered *by attorney*, the recovery may be avoided by writ of error, as well after the infant shall be adult, as during his minority.

The prominent ground of this distinction, is, an infant cannot appoint an attorney.

But an effectual recovery might be suffered by an infant under a writ of *privy seal* ; but such practice is now obsolete, and the place of writs of *privy seal* is supplied by applications to parliament for private acts, enabling infants to settle, or to enter into articles for a settlement, on their marriage.

At this day few or no attempts are made to obtain fines or recoveries from infants, since the rules of the court of Common Pleas require an affidavit by one of the commissioners that he knows the parties, and that they are of full age, and competent understanding.

All conveyances by infants, except conveyances made in performance of a condition, or in pursuance of a custom, as of gavelkind lands, or the custom of some particular towns, &c. are voidable at least.

And it is in every day's experience, that \*infants make [\*320] conveyances as mortgagees or trustees under the provisions of the Act of 7 *Anne*, c. 19, intituled, " An Act to enable infants " who are seised or possessed of estates in fee, in trust, or by way " of mortgage, to make conveyances of such estates."

That act extends to copyhold as well as to freehold lands, [order by Court of Exchequer, 26 June 1768. 7 Term Rep. 103. Watkins's Copyhold, 63 ;] to lands out of England as well as land in England ; therefore an infant was ordered in one instance to convey lands in a West India island, *ex parte Anderson*, 5 Ves. 240. 3 Bro. C. C. 324 ; and in another instance, *Evelyn v. Forster*, 8 Ves. 96, lands in Ireland. It also extends to infants, although they be married women, but then a fine, or, according to the circumstances, a recovery must be suffered, *Lombe v. Lombe*, Barnes, 217. *ex parte Bowes*, 3 Atk. 164. *ex parte Smith*, Ambler, 624. *ex parte Johnson*, 3 Atk. 559 ; and the court of Common Pleas must dispense with its rules respecting the affidavit against infancy, coverture, &c. But the act does not extend to any case in which the infant has any *beneficial* interest in the property of which he has the legal estate, as a mortgagee or trustee. *Ex parte Sergison*, 4 Ves. jun. 147.

Nor does it extend to any case in which there are *trusts* to be performed, requiring a discretion on the part of the infant; but in modern practice the latter rule has been relaxed; for if all [\*321] \*the persons beneficially interested under the trusts to be performed are adult, and free from disabilities, and will petition the court for a conveyance to their nominee, the court will treat the infant as a mortgagee or trustee within the act.

In regard to trust estates, it is necessary that the trust should be declared by writing, or established by decree, (*ex parte Vernon*, 2 P. W. 549,) and not depend wholly on the learning of resulting trusts, or trusts by implication; and therefore an infant is not a trustee by means of a contract to sell, so as to be authorized or enabled to convey under the statute. But in *ex parte Crowther*, the only evidence of a trust of some copyhold lands purchased by the corporation of London in the name of Mr. Crowther their controller, was to be collected from a receipt for the consideration money in a separate instrument. The receipt imported that the money had been paid by the corporation of London, by the hands of Mr. Crowther; and on this evidence Master Steele, after some hesitation, reported the infant to be a trustee, and an order was obtained, directing the infant to convey, or rather, the lands being of copyhold tenure, to surrender. It ought however to be noticed, as highly probable, that the case passed before the court without having its particular attention drawn to it; and of course it has not the authority which would be allowed to a case fully argued and decided on the point.

[\*322] \*It is also to be observed, that if the legal estate in the infant be entailed, the proper means for barring an entail must be observed. *Ex parte Johnson*, 3 Atk. 559. From the language, also, of 2 P. Wms. 549, it is probable, that after a decree by the court, establishing a trust against an infant under the learning of resulting trusts, or trusts by implication, the court would treat the infant as a trustee within the meaning of this act. In *Goodwyn v. Lister*, 3 P. Wms. 387, it was held, that the statute extends only to cases of express trusts, and not to such as are implied or constructive only.

In that case, the application was for a conveyance from the heir of a man who had entered into a contract for sale, and the object was to obtain a conveyance in performance of the contract; but the court would not make a decree against the infant for an immediate conveyance, *Sikes v. Lister*, 5 Vin. Abr. 541; nor can any order be made under the act, unless the petitioners have the absolute right, *ex parte Anderson*, 5 Ves. 240; and the infant will not be ordered, at least upon petition, to convey to another trustee to execute the same trusts; but perhaps he would be ordered on a bill, praying the appointment of a new trustee, and a conveyance; and when all the creditors petition, an order may be made for a conveyance to them, or as they shall direct. *Ex parte Anderson*, 5 Ves. 240. So an infant, being one of two executors, and

interested as such, may be ordered to convey \*after pay- [\*323]  
ment to the other executor. ——— v. *Handcock*, 17 Ves.

384. So an infant will be ordered to convey, though he be beneficially interested in the assets to be administered by the executor. *Ex parte Bellamy*, 2 Cox Rep. 424. And an infant must convey, though he be a trustee for a charity; *Attorney General v. Pomfret*, 2 Cox, 221; unless he as heir be to do something besides the mere act of conveyance. And the appointment of new trustees puts an end to his duty as trustee. *Ibid*.

Also, by statute 29 Geo. II. c. 31, infants, although the beneficial owners, are enabled to surrender leases for the purpose of renewal.

A distinction has always been made by sound lawyers between different acts of an infant; some were considered as void; others as voidable.

For instance, a feoffment by an infant in person was voidable only, and not void, while the feoffment of an infant made by attorney was considered as actually void.

The reason of this distinction was, that the infant could not appoint an attorney; in more correct terms, he could not make a deed; and an attorney, who is, as such, to make livery, or to execute a conveyance, cannot be appointed without deed.

Also a lease made by an infant, with a reservation of rent, was considered as voidable only, not as void. For it was the interest of \*the infant to be able to lease his lands, that he [\*324] might obtain a rent.

But a lease made by an infant, without any reservation of rent, except for the purpose of trying the title in ejectment, in other words, as a mere form, as it is manifestly to his prejudice, so it is considered as actually void.

On the same principle, a single bill, a bond without any penalty, by an infant for necessities was good; while a bond with a penalty, and conditioned for the payment of the sum laid out in necessities, was considered as bad, at least as voidable by plea of infancy. For it would be to the prejudice of an infant to be able to subject himself to a penalty.

Every grant by an infant which necessarily required a deed, was considered as actually void, and therefore he could not grant, or transfer a rent, nor grant a reversion or remainder, or make an attorney, or as a consequence execute a conveyance by lease and release, since a deed is essential to the validity of a release.

This distinction was disregarded in *Zouch v. Parsons*, 3 Burr. 1794; and in that case a conveyance by an infant trustee, under the direction of his *cestui que trust*, was considered as voidable only, and not void.

This case has never been acted on in general practice; and the decision is so objectionable in its principle, and appears so irreconcilable with the former determinations, or the policy of the \*law; and the reasons assigned in support of the [\*325]

decision are so sophisticated that its authority is highly questionable, and it has more than once been questioned ; and it is reasonable to suppose that it would not be followed as a precedent for decision, except in a case exactly the same in specie and in circumstances. Indeed it would be difficult to support it even to this extent. No experienced conveyancer will accept a title under the authority of this decision.

In this place it is to be observed, that if a fine be levied, or recovery suffered by an infant, and such fine or recovery be voidable only, and not void, the *deed* of an infant declaring the uses of the fine or recovery will be good so long as the fine or recovery remains in force. For as the fine or recovery is the principal, and the uses only the accessory ; or rather as the uses are to arise from the *seisin* of the conusee in the fine, or recoveror in the recovery, the law which supports the principal, also supports the uses as the accessory. See *Mansfield's case*, 12 Rep. 123 ; *Hugh Lewing's case*, 10 Rep. 42 ; 2 Rep. 58 a ; *Ann Hungate's case*, 12 Rep. 122.

In many cases, however, a court of equity will, under equitable circumstances, interpose its jurisdiction, and treat a conveyance, obtained from an infant, as subject to a trust for his benefit, and decree a reconveyance.

It is also observable, that an infant may execute an authority not coupled with any interest ; thus he may be an *attorney*.

[\*326] \*He may also execute a *power* coupled with an interest, if his infancy be dispensed with ; or if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority.

A power, however, given to an infant will not be considered as authorizing an exercise during his minority, except the minority be expressly dispensed with, or there be some circumstance which discloses an intention that the power may be exercised during minority. *Hearle v. Greenbank*, 3 Atk. 695.

And if coverture be expressly dispensed with, and the power be silent as to minority, the dispensation with coverture affords a conclusion against, rather than in favour of, a dispensation with the disability of minority.

When a conveyance made by an infant is actually void, the entry of the intended grantee will, in many, and indeed in most, cases, gain the fee to him, by wrong, by way of disseisin.

Of course the infant will have only a right of entry, and that right must be pursued by him or his heirs within the limited periods prescribed as bars against dormant titles.

So conveyances which are voidable may be avoided by the infant, or by his heirs.

On the other hand, a right of entry may be barred, as to all or some of the lands by release, or the title may be confirmed, in the whole or in part, by the infant when adult, or by his heir.

[\*327] \*In some cases, as in the instance of leases reserving a rent, or the like, the title may be confirmed by acceptance

of rent by the infant, after the age of majority, or by the heir, or it may be confirmed by any other act which recognises the title of the grantee.

And a confirmation or release by the infant when adult will be binding on his heirs, or other representatives.

It is true, *an estate which is void does not admit of confirmation.* Still, however, an estate gained by disseisin is unquestionably such a title as admits of being established and rendered indefeasible, by a confirmation.

Infants are also protected from injurious bargains ; since, when adult, or in the event of their death, while minors, or before agreement their heirs may disaffirm, and by disagreement annul conveyances, leases, &c. made to them while infants. 1 Inst. 380. b. Comyns's Dig. Infant, c. 9.

### *As to Idiots.*

THESE persons are considered as not having any sense whatever ; yet it has been said, that their grants are voidable only, and not void. But in *Thompson v. Leach*, 3 Mod. 296, 2 Vent. 198, a surrender by a lunatic was considered as actually void, and not merely voidable ; and this seems most reconcileable with reason and principle ; and the point must be equally \*applicable [\*328] to every species of grant by deed, as distinguished from grants by matter of record. It is said an idiot may execute a naked authority ; but surely that doctrine cannot in good reason be applied to any case in which discretion is to be exercised. How can an idiot even deliver a deed as the act of the person in whose name he is to officiate ?

Of the same description with idiots are persons born *deaf, dumb, and blind*, since they have not any means of receiving information, or of communicating their thoughts.

Persons who are blind, or deaf, or dumb, or who at the same time labour under two only of these infirmities, may levy fines, if it appear that notwithstanding these disabilities they are capable of comprehending the nature and consequences of a fine ; and can express their meaning by writing or signs, and there are three instances of persons born deaf and dumb ; *Elliot's case*, Carter, 53 ; *Griffin v. Ferrers*, Barnes's Cases of Pract. 19 ; *Keys v. Bull*, id. 23, who were notwithstanding permitted to levy fines. 1 Cru. 103. Persons so circumstanced can of course make any other species of assurance.

A person deaf, dumb, and blind, cannot make a deed, or pass an estate by feoffment or demise. As to feoffment and demise, for these reasons ; a feoffment or demise is to be made either in person or by attorney. When made in person it is by a corporeal investiture of the land, by delivering over the seisin or possession \*of some part of the land, or some other article in the name [\*329] of seisin, and accompanying the act of livery with words

declaratory of the act, or by some means referring to a charter as containing a declaration of the intent with which the livery or investiture is made ; and neither of these acts can be done by a person who is deaf, dumb, and blind ; for though a person so afflicted may make livery of a clod of earth, or a twig, or any other article, being a substantial object, yet, first, being dumb, he is deprived of the power of utterance, and consequently of declaring by words proceeding from his mouth, the intent and object of that act, or, in other words, the *quo animo*, it is done ; secondly, being deaf, he is incapable of understanding any expression which may be addressed to him, in order to his doing some act, or making some sign to denote, either affirmatively or negatively, whether the act of livery which he has made is to have the effect of a legal and formal transfer of his estate in the lands ; and thirdly, being blind, and also deaf and dumb, it is morally impossible that he should have any such idea of characters, and the power of communicating their import, as will render them intelligible to any one. That the use of characters might give him the ability to pass his estate, they must be intelligible to others as well as to himself.

And when livery of seisin is made by an attorney constituted for that purpose, the power, as being necessarily delegated by a [\*330] writing \*under seal, and delivered, falls within the consideration of his inability to make a deed. And a man deaf, dumb, and blind, cannot make a deed, for a deed cannot be made except on an intention ; an actual, or what in law is the same, a supposed, agreement to do or omit that which is to be done or omitted, and to grant or transfer that which is to be granted or transferred. And for the reasons already stated, it is altogether impossible that a person deaf, dumb, and blind, should so far understand any proposition, or the contents of a deed, as to agree to its subject matter ; for he cannot read it himself, and if it be read to him, he, as being deaf, cannot understand it ; and many other reasons, deducible from the incidental circumstances of sealing and delivery, might be insisted on. The judgment of the reader will readily suggest these reasons to him, when he comprehends the purpose for which these ceremonies are required to the authenticity, or the essence and perfection of a deed.

### *Of Lunatics.*

LUNATICS, while they continue in a state of lunacy, are in the same predicament with idiots ; but during their lucid intervals they are competent to do any act like other persons.

But a title derived through a lunatic is always to be re-  
[\*331] ceived with great caution, because the \*validity of the deed depends on extraneous evidence ; and if a habit of lunacy should be established by evidence on the part of the person who wishes to impeach the title, it will be incumbent on the person claim-



ing under the deed to prove that it was executed during a lucid interval. *Attorney-General v. Parnther*, 3 Bro. C. C. 441.

And if fines are levied, or recoveries suffered, by an idiot or lunatic, and such recoveries are suffered by the idiot, &c. in person, they cannot be impeached. *Mansfield's case*, 12 Rep. 124; *Hugh Lewing's case*, 10 Rep. 42.

To the disabilities of idiots and lunatics there are some exceptions. By statute 4 Geo. II. c. 10, they are enabled to make conveyances of estates of which they are mortgagees or trustees; and under the statute of 43 Geo. III. c. 75, sales, mortgages, or leases, may be made of the freehold and leasehold estates of idiots, &c. for the purpose of payment of debts, &c.; and under the provisions of 29 Geo. II. c. 31, they are enabled to make surrenders of leases for the purpose of renewing the same.

Before these acts can be called into operative force there must be a commission of lunacy, &c. 2 Ves. jun. 583; and a person found a lunatic by the laws of a foreign state is not a lunatic within this act, 8 Ves. jun. 316; and under the provisions of 36 Geo. III. c. 90, stocks standing in the names of lunatic trustees may be transferred. In these instances, the acts are \*in substance [\*332] performed by the committee, though they are done in the name and on the behalf of the lunatic, &c.

*As to Married Women; and therein of Husbands and Wives.*

THE maxims which belong to this division are,

1st, *Husband and wife are, for many purposes, one person.* [*Dua animi in carne una.* 6 Rep. 4.]

2d, *The wife is of the same condition with her husband; hence she becomes noble by marriage with a peer of the realm.*

3d, *They cannot, at law, sue one another; nor can they, at law, make any grant one to the other, or the like.*

4th, *Upon a joint purchase, during the coverture, either of them taketh the whole; viz. they are seised or possessed by entireties.*

5th, *The husband is the woman's head.*

6th, *All she hath is her husband's.*

7th, *Her will ought to become his will, and to be subject unto it.*

See Wingate's Maxims, 308, 309, 310, 311, 312, 313, 314.

On account of the unity of the persons of husband and wife, a husband cannot grant to his wife; Litt. § 168. 291. 1 Inst. 112; nor covenant with her so as to create a legal obligation; 1 Inst. 112 a; nor covenant with her to stand seised to uses; Ibid.

Wing. Max. § 10; \*and being lord of a manor he cannot [\*333] make a copyhold grant to her. *Firebras v. Penant*, 2 Wils.

254. But a copyholder may surrender to the use of his wife. 1 Watk. Copyh. 65. *Bunting's case*, 4 Rep. 29 b. Wing. Max. 210.

Nor can the wife on account of her coverture grant to her husband. 1 Inst. 187.

But a husband may devise to his wife. 1 Inst. 112 a. Litt. §

168. Wing. Max. 214. But except under a power or authority, &c. she cannot devise to her husband, ib.

And a husband may by a conveyance to uses, or upon trusts, create a use or a trust in favour of his wife. 1 Inst. 112 a.

And equity will decree performance of a contract by her husband with her for her benefit. *Moore v. Ellis*, Bunb. 205.

And a wife may, by a fine or recovery, and a declaration of the uses thereof, declare a use for her husband's benefit.

And a husband or wife may act as *attorney*, in doing an act for the other in exercise of the authority; or one may execute a power, being a mere authority, in favour of the other.

Wives may alien their estates of freehold, or of inheritance, or extinguish their titles of dower, and all other rights and interests, jointly with their husbands, by fine or recovery, or as to lands of copyhold tenure by surrender.

Their interest in chattels real, except such interest as the [\*334] wife hath by the provision or \*consent of the husband, by way of settlement, (Sir *Edward Turner's case*, 1 Vern. 7;) and also her personal chattels (except personal chattels settled for her separate use) may be aliened by her husband alone, either wholly or partially, 1 Inst. 351, or forfeited by his outlawry or attainder. The forfeiture of the husband will attach on a term which he and his wife have jointly. *Hales and Petit*, Plowd. Com. 257.

On this subject, the Abridgments of *Viner* and *Bacon*, and *Comyns's Digest*, title Baron and Feme, and Mr. *Buller's notes on Coke on Littleton*, *Toller's Executors*, and the treatise intituled *Laws of Women*, are particularly deserving of attention; and as a large proportion of the concerns of mankind respecting property depend on the transactions of husbands and wives, this subject should be thoroughly investigated. And the differences which are taken between the freehold, and chattel real property of the wife, and between her personal chattels, and her *choses in action*, should be most diligently studied.

The following is a short and general summary of this comprehensive title of the law.

As to freehold lands, held either in fee simple, in fee tail, or for life, the husband and wife are seised in right of the wife. *Polyblank v. Hawkins*, Dougl. Rep. 329.

His alienation would be good as against himself; and, from the authorities, when closely examined, it seems that he has the [\*335] power to \*transfer the *whole* estate of his wife, subject only, at this day, to the right of entry of the wife, or her heirs; for even when he discontinues the estate of his wife, the injury may be redressed, and the estate revested by the *entry* of the wife, or of her heirs. In the mean time, however, the estate of the wife will be in the alienage of the husband; for the statute of 32 Hen. VIII. c. 28, § 6, did not restrain the extent of the power of alienation by the husband. It merely changed the remedy from an action to an *entry*.

Hence the wife may be barred by the husband's fine and non-claim. 1 Inst. 326 a.

According to some authorities, a grant by him alone, not creating a discontinuance, will determine on his death, and unless he be entitled to be tenant by the courtesy of England, even on the death of his wife.

But there are other authorities which treat the alienation of the husband alone as voidable, and not void, so that the wife or her heirs must enter to defeat the estate which he had granted; and it is clearly law, that a lease by the husband alone, by indenture or deed-poll, of the lands which he holds in right of his wife, is voidable only, and not void, and will therefore continue after the death of the husband, until entry or avoidance by the wife, or her heirs. Bacon's Abr. Leases.\*

And when it is remembered, that prior to the \*statute of [\*336] 32 Hen. VIII. c. 28, § 6, the husband might have discontinued the inheritance of the wife by his alienation, so as to have put her or his heirs to her remedy by action, 1 Inst. 326 a. the more reasonable opinion seems to be, that an estate conveyed by the husband alone will continue till defeated by the entry of the wife, or of her heirs; and there are some strong expressions in the books which favour this opinion.

To bind the wife there must, as to lands of freehold tenure, be a fine or recovery by her; except as to some leases; and these leases must be made pursuant to the statute of 32 Hen. VIII. c. 28, and have the various requisites prescribed by that statute.

By the custom of some cities and boroughs, as London, Norwich, &c. &c. the wife's estate may be conveyed without fine or recovery, by a bargain and sale, acknowledged and enrolled according to the custom of the city or borough.

There is an equal inability in the husband, or in the husband and wife, to defeat the wife's interest in a freehold lease by *surrender*, without some assurance by record: with the exception, that the husband and wife are, by the statute of 29 Geo. III. c. 31, enabled to surrender the leases of the wife for the purpose of renewal.

However, it is to be observed, that if a married woman levy a fine, as a *feme sole*, this fine will be good against the wife and her heirs, unless it should be avoided by the husband \*du- [\*337] ring the coverture; and it is agreed that he may avoid the fine for the benefit of the wife as well as of himself.

And if a lease, or other estate, granted by the husband, or by the husband and wife, be voidable only, it may be confirmed by the wife after the death of the husband, or after the death of the wife by her heirs; or it may be confirmed by the wife during the coverture, by a fine to be levied, or recovery to be suffered, by her and her husband. A void lease cannot be confirmed.

\* See *Doe v. Butcher*, Dougl. 50, and the notes; they seem authorities for a contrary doctrine.

To these general observations there is *one exception, she may convey in performance of a condition ; and for the same reason it was argued, that she might convey an estate of freehold which she had as trustee. But as the law does not take any notice of trusts, the better opinion, sanctioned by uniform practice, is, that, as to the estates of freehold, which a married women has as trustee, no effectual conveyance can be made by her without a fine or common recovery.*

The distinction between conditions and trusts is obvious ; the one is of a legal, the other is merely of equitable, cognizance. The law takes no notice of trusts. But in conveying according to a condition, the wife is preserving the estate according to the proper state of the title. But if a farm called *A* were conveyed to her in fee, upon condition that she should convey a farm called *B*, in a particular manner, she could not, it is apprehended, make [\*338] an effectual \*conveyance of the farm *B* without a fine, &c.

Also if husband and wife levy a fine, or suffer a common recovery, a declaration of the uses by the husband alone will bind the wife and her heirs, unless the wife disagree to these uses. *Beckwith's case*, 2 Rep. 24.

And if the husband and wife do not agree in declaring all the uses, then the uses will be good so far as the husband and wife agree, and void so far as they disagree, in declaring the uses. *Ibid.*

This subject, with its distinctions, is fully discussed in the 1st vol. of the *Practice of Conveyancing*.

And if they sell the land for money, and then levy a fine to the vendee, without declaring any uses of the fine, the fine will bind the wife, and confirm the title of the purchaser, although the sale was not at first binding on the wife. 2 Rep. 24.

In *Swanton v. Raven*, 3 Atk. 105, the husband and wife levied a fine, and the husband alone declared the uses in favour of a purchaser ; a court of equity would not afford relief to the wife after an acquiescence for fifteen years from her husband's death.

Also a married woman may execute an authority or power simply collateral, without the concurrence of her husband ; and she may even exercise such power or authority in his favour ; 1 Inst. 112 a. b.

Equity would however view a sale to a husband by a wife [\*339] under an authority, \*being a trust, with great suspicion, and perhaps treat it as a nullity.

She may also exercise a power coupled with an interest, if the disability of coverture be in express terms dispensed with, or if from the nature of the power it can be collected that the power is exerciseable during coverture ; and if a power be given to a woman to be exercised at any time, and from time to time, notwithstanding her coverture, these words, "notwithstanding her coverture," are a dispensation with the disability of coverture ; and the power may be exercised as well after as during the continuance of the coverture. *Doe v. Weller*, 7 Term Rep. 478.

In cases of copyhold lands, the surrender, and of freehold lands

the conveyance, should be to such uses as she, whether covert or sole, and notwithstanding her coverture, shall appoint.

But if a power be given, which, in sound construction, is to be exercised during coverture, or by a woman, *being sole*, (*Lord Antrim v. Duke of Buckingham*, Sugden, 134,) the coverture in one case, and in the other case its absence, will be a limited period, within which the power may be exercised, and the existence of the coverture in one case, and in the other case its absence, will be essential to the valid exercise of the power.

The opinion which prevails at present is, that a power coupled with an interest, and vested in a married woman, may be executed by her during coverture. Lord *Hardwicke*, 3 Atk. 711, refers to the case of *Baumont v. Rich*, 3 Bro. \*Parl. Cases, 308, [\*340] as having decided this point. He also refers to the case of *Lady Travel*; and Mr. *Sugden*, in his valuable *Essay on Powers*, p. 134, has quoted a long list of cases in support of a like doctrine. The case of *Lady Travel* has not been found; and the case of *Baumont v. Rich*, instead of having decided the point, left it, as far as an opinion can be formed from the Reports, in doubt; and all the other cases are instances of powers to lease; and such powers are, from their nature, to be exercised during coverture; since it is manifestly for the benefit of the married woman, and of the persons in remainder or reversion, that the property should be duly and properly tenanted. It is too much then to consider it to be clear, that a power given to a woman by way of interest is without a dispensation, in terms or by circumstances, with the disability of coverture, exerciseable with effect, while she is under coverture.

As to *rights and titles*, as well as to *estates*, as far as they respect interests of freehold of the wife, she cannot be bound without a fine levied, or recovery suffered, by her; or, which is equivalent, by the decree of a court of equity.

As to copyhold lands, however, the wife may, as to any estate, or any future interest, though contingent, or right or title, be bound by a customary surrender, on which she is to be solely and secretly examined according to the custom of the manor.

\*A surrender, however, will not operate by way of estop- [\*341] pel, (*Goodtitle v. Morse*, 3 Term Rep. 365; 1 Anstr. 11,) so as to bind any interest which, if of freehold tenure, could not be bound by *release*; as an expectancy of an heir, a contingent remainder to a person not ascertained; as the survivor of husband and wife, or a class of persons who are to answer a given description, as the children of *A*, who shall survive *B*, who is still alive.

She may also, as to estates and interests, though future, be bound by a customary recovery; and such customary recovery, or other customary mode of barring entails, should be observed when the wife has an estate tail, or an interest by way of right or title to an estate-tail in copyhold lands.

And according to the opinion of Lord *Hardwicke*, in *Pullen v. Middleton*, (9 Mod. 483,) a fine levied or recovery suffered in the

King's court at Westminster, would be an effectual alienation of the trust of a wife in customary lands, held by her and her husband for an estate in fee-simple.

But the *entail* of the trust of copyhold lands cannot, except in particular cases, be barred, without pursuing the customary mode of barring entails in the lands themselves.

When a husband and wife, in right of the wife, have a contingent interest in fee in copyhold lands, it should seem that their customary surrender will operate as an effectual release ; [\*342] \*but when they have a contingent remainder in tail, it seems extremely difficult to discover any legal mode by which the title to the entail may be extinguished. The only mode which is feasible, and can be relied on, is by a decree in equity obtained on a bill for the purpose.

Before such assurances shall be acted upon decisively, the law on this subject should be closely investigated.

When a woman has a trust of freehold lands by way of separate estate, she has, so far as she is by the nature of the trust treated as a *feme sole*, the complete dominion over that estate, and may transfer the same ; and her conveyance of the freehold to the tenant to the writ of entry for suffering a common recovery, will, *ceteris paribus*, support that recovery. *Burnaby v. Griffin*, 3 Ves. jun. 266.

This was a decision of Lord Alvanley, and it is founded in principle ; and though it was contrary to the opinion of the bar, and of some gentlemen of eminence in the conveyancing branch of the profession, very little doubt can be entertained of this decision being followed as a precedent.

#### *As to Leases for Years, or other Chattel Interests.*

THE husband and wife are possessed in right of the wife, and, except as to estates or interests settled by the husband, or by the [\*343] husband \*and wife on their marriage, by way of provision for her, and whether such interests be legal, or as it should seem equitable, the husband alone may bind the interest of his wife by *lease*, *assignment*, or *surrender* ; by reference to arbitration, and an award thereon, by forfeiture ; by bankruptcy ; or by judgment and execution against him. But he cannot dispose of her chattels real by will or testamentary disposition ; nor bind his wife's interest by a mere charge, as an annuity, &c. 1 Inst. 351 b. or by a judgment without execution ; but his contract to sell will be an equitable alienation. *Stead v. Cragh*. 9 Mod. 42. And if the wife should survive the husband, the term, so far as it shall not have been aliened or forfeited by the husband, will remain with the wife, 1 Inst. 351 a ; but if the husband should survive, it will, whether legal or equitable, remain with him, *jure mariti*, and consequently without letters of administration to be obtained of her effects. Alleyn, 15 ; 1 Roll. Abr. 345, l. 40.

It is observable, however, that if the wife have a possibility of a term, (Wing. Max. 213, pl. 13 ; 10 Rep. 51 a ; 1 Inst. 46 b. 351 a ; 9 Mod. 104,) which cannot by any means vest in the husband during coverture, the husband's release, or other disposition, will not affect her ; but he and his wife together may bind this possibility by a fine, *sur concesserunt*. Nor can he alone alien a term settled for the *separate use* of the wife, or a term which is settled on *\*their* marriage as a provision for her, as distinguished [\*344] from a settlement by a former husband. Sir *Edward Turner's* case, 1 Vern. 7 ; *Wilham's* case, 1 Inst. 350 b.

On the contrary, she may act on a term settled for her *separate use*, as if she were a *feme sole*, as far as she is made a *feme sole* by the trusts declared in her favour ; and she jointly with her husband may by a fine alien a term settled for her benefit on her marriage.

Lord *Alvanley* doubted whether the husband could dispose of the *trust* of a term which he had in right of his wife ; but the authorities, as far as there is any decision on the point, are in favour of the husband, with the exceptions already noticed.

Chattel interests by extent, by elegit, and similar interests, fall under the like consideration as terms for years, and are equally at the disposal of the husband as terms for years. 1 Inst. 351.

When a woman at her marriage has the right only to a term, the right will not survive to the husband, but belong to her representatives. 1 Inst. 351 a.

So a lease by the husband alone, when he has a term in right of his wife, will bind the wife. *Young v. Radford*, Hob. 3 ; 1 Inst. 46 b. Wingate's Max. 213, pl. 13.

The rent, if any be reserved by him, will belong to him and his executors or administrators, 1 Inst. 46 b ; and if he die in the lifetime of the wife, without any further disposition of the *\*term*, the rent will belong to his representatives, and the [\*345] reversion expectant on the under lease will belong to the surviving wife. Ibid. Wingate's Maxims, 213, pl. 12.

Had the husband and wife joined in the lease, then the rent would have been incident to the reversion, as well after the death as during the life of the husband, and would have belonged to the wife. Ibid. pl. 15.

Suppose the husband to mortgage the term of the wife, these distinctions arise :

1st, If the equity of redemption be reserved to *the husband and wife*, the equity would belong to them.

2d, If they joined in the mortgage, the equity of redemption would then also belong to them.

But if the husband alone make the mortgage, and reserve the equity of redemption *to himself*, then the wife will be excluded ; *sed quare*.

Also, if the husband alone assign the term, subject to a condition, and enter for the condition broken during *the coverture*, the husband will be again possessed in right of his wife as before ; and the

wife being the survivor may be entitled. 1 Roll. Abridg. §40, l. 45—50.

But if the husband die before the condition is broken, his executors, &c. must enter for breach of the condition, and will hold discharged of the title of the wife. Wingate's Maxims, [\*346] 213, pl. 13.

\*In this case the law is different as to freehold estates, in reference to the learning of discontinuance. 1 Inst. 336 b. Litt. sect. 632.

And if the husband alone, or the husband and wife, mortgage the whole term, and the husband take back the term to himself alone, by re-assignment, the state of the title will be altered at law, and the wife cannot, either at law or in equity, assert a title to the term, even though she should be the survivor.

When the husband regains the term by force of a condition, his old title revives, *Young v. Radford*, Hob. 3 ; while a re-assignment gives him the term at law under a new title ; and the wife cannot assert any equity to control the legal title.

These distinctions, though drawn on very mature consideration, are to be received with great caution.

Another exception is to be noticed ; the term of a wife will not vest in a husband, being an *alien*, so as to forfeit to the crown, *Theobald v. Duffy*, 9 Mod. 102 ; yet the crown will, it is apprehended, be entitled to the pernancy of the profits during the coverture. 1 Inst. 351 a.

In short, the *act of law* does not vest any real property in an alien ; and therefore an alien cannot be tenant in dower, or by the curtesy, or become possessed of a term in right of the wife. 1 Ventr. 417. *Actus legis nemini facit injuriam*, is the maxim.

[\*347] \*As to personal Chattels and Choses in Action.

PERSONAL chattels in the possession of the wife become the absolute property of the husband on the marriage, or as soon afterwards as the property in them is acquired, and that property is accompanied by possession. 1 Inst. 351 a.

Corn sown by the husband on the lands of the wife, whether freehold, copyhold, or chattels real, which he has in her right, will belong to the surviving husband ; or if he die in her life-time, to his personal representatives.

This proposition seems to flow from the law respecting emblements.

But if the husband and wife are *joint-tenants*, or tenants by *entireties* of the lands, then the corn growing on the land at his death will belong to the survivor of the husband and wife. Wingate's Maxims, 211, pl. 1. The rule in this instance is, *cedit solo*.

Choses in action, as legacies, money due on bond, judgment, and the like, must be sued for in the *joint names* of the husband and wife, unless the bond be given to the wife during coverture, or to



the husband and wife jointly. In the excepted cases, the husband may disaffirm the contract as far as it is in favour of the wife, and bring the action in his own name. *Beavor v. Lane*, 2 Mod. 217; 4 Term Rep. 617; and cases there cited.

\*The case in *Levinz*, part 3, 403, *Howell v. Maine*, which [\*348] assumes that the husband alone may bring an action on the bond given to his wife alone, seems to be a solitary case; and it is difficult to understand the principle on which it was decided; for how can a husband, consistently with any principle of law, disaffirm the contract, and at the same time maintain an action upon it. He could not treat a grant to his wife as a grant to himself; and there is the same reason against his treating a bond to his wife as a bond to himself. To justify the decision, the principle must be carried to the extent that the husband can by law derive a title to sue in his own name under a bond to his wife, and must agree to the bond as the means of supporting the title in himself to the benefit of the bond. Then this case will stand on the ground of *acceptance*, or agreement, while the case of a bond to the husband and wife during coverture is sustainable, on the ground, that the husband may disagree to the bond as far as it is in favour of the wife, and accept it as far as it is a bond to himself, and may declare upon the instrument as a bond to himself alone. *Ankerstein v. Clarke*, 4 Term. Rep. 616.

Even choses in action, &c. may be released by the husband alone, and a payment to him will be a good discharge. Nor is it incumbent on the husband, when he has a legal remedy for the debt, to make any settlement or provision \*on the [\*349] wife; but unless the money shall be released by the husband, or paid to him, or unless the right shall be changed, (as in the case of an award, ordering the money to be paid to the husband, or judgment recovered by him alone,) the interest of the husband, as husband, will determine on his death; or if his wife die in his life-time, then on her death; and if the wife survive the husband, the choses in action will belong to her, and she alone may sue for them.

If the husband survive the wife, then these *choses in action* will belong to her personal representative, and the husband may take them as such; but then they must be applied in a due course of administration, and consequently in discharge of the debts, if any, owing by the wife, under contracts made by her while sole.

This is universally the rule as to the legal right; but the equitable right may be varied by contract; and for this reason, if the husband make a settlement on his wife, in consideration of her portion, and the husband or wife die before the portion is reduced into possession, this agreement will give to the husband's representatives a right in equity to receive the wife's portion. *Adams v. Cole*, Cases T. Talb. 168. So also, if the wife have a separate estate in these choses in action, she will be considered as a *feme sole*, as far as she

is made a *feme sole* by the term or nature of the trust, in her favour ; and though the husband may release a chose in  
 [\*350] \*action of his wife, or the money due to her may be safely paid to him, neither he nor any person claiming under him by actual assignment, nor by operation of law, as assignees under a commission of bankrupt, can compel the payment of the wife's portion from trustees, except in the case in which the husband is a purchaser of his wife's portion, without making a settlement on his wife by way of portion for her.

This head of equitable jurisdiction is now branched into a great variety of distinctions, and the learning on the subject will be found in *Bridg. Thes.* title Baron and Feme ; Mr. *Cox's* notes to *P. Wms.* and *Fonblanque's* Treatise of Equity. On the same subject there are several important cases in the Reports of Mr. *Vesey*.

The preceding observations have been applied to chattels, &c. belonging to the wife in her own right ; but she may have chattels, &c. in her character of executrix or administratrix. These chattels, while they remain in specie, and also choses in action of the deceased, will belong to the wife if she survive ; and if she die in the life-time of her husband, to the personal representatives of the person to whom she is executrix or administratrix ; but during the coverture the husband alone may assign or surrender the term which the wife hath as executrix, &c. or may release or receive money due on choses in action of the person whom she represents.

As to *attainted persons*, *aliens* and *others*, who are under  
 [\*351] similar disabilities, and as to \*bankrupts, &c. the more convenient arrangement will be to consider their condition, and connection with titles, in a subsequent part of the work. To discuss the subjects fully or usefully in this place, would interrupt that investigation of title which is the immediate object of this part of the work.

It is necessary only to observe in this place, that a defect may exist in the title, because it is derived under a person attainted, an alien, a bankrupt, &c.

The nature and extent of that defect will be a subject for future discussion.

These disabilities may be considered as *personal*, or in respect of the person, or of crime, or of forfeiture.

### *Of Tenants for Life.*

OTHER disabilities, or, more correctly, the want of ability, may arise from the nature and extent of the estate of the party.

The rules are *nemo potest plus juris in alium, transferre quam ipse habet. Qui non habet ille non dat.*

Therefore, if *A* be a tenant for life, he cannot, at least rightfully, convey any greater interest than for his life.

Acts done under powers or authorities are governed by other rules.

He may also devest the estates in remainder or reversion by a tortious alienation, and incur a forfeiture of his estate.

\*This may be done by a feoffment, fine or recovery, of [\*352] tenant for life in possession, that is, having the *immediate freehold*.

But such feoffment, &c. is considered as a *tortious alienation*, and not as a *conveyance*. Litt. sect. 611 ; 1 Inst. 330 b.

On alienations by tenants for life, various and important distinctions, necessary to be understood in the investigation of titles, will be found in books of approved authority.

1st, A grant by tenant for life passes no more than his own estate for life, although the deed import by its language to give a larger estate, as in fee, Litt. sect. 609, 610 ; and if he grant to a man and the heirs, or heirs male of his body, the grantee will have a mere estate of freehold, transmissible to the heirs of that description, as special occupants, and the grantor will retain a reversion.

2dly, A feoffment by tenant for life passes the fee-simple ; namely, it passes more than was vested in the tenant for life ; and the feoffment will have this effect, although it proceed from a tenant for life, with a remainder to him in tail, as often as there is a mesne estate. Litt. § 611. 415, 416 ; 1 Inst. 251 and 302 b ; Bro. Abr. Descent, pl. 2 ; *Chudleigh's case*, 1 Rep. 120 ; and *Bredon's case*, 1 Rep. p. 76.

It is also to be observed, that some assurances by tenant for life do, and others do not, devest the seisin of the entire fee-simple. Litt. sect. 415, 416 ; 1 Inst. 251 b. and 330 b.

\*That an assurance devests the seisin is a consequence [\*353] of its passing a fee-simple ; for there cannot be two fee-simples in one and the same land. One fee-simple necessarily excludes the other : Litt. sect. 620 ; Bro. Abr. Descent, pl. 64 ; therefore, whenever tenant for his own life passes more than an estate for his life, and conveys less than the fee, he gains a new reversion. Litt. § 620 ; 1 Roll. Abr. 676 ; Finch's Law, 135.

A feoffment, a fine, or recovery by tenant for life, is the only conveyance which will, by its own operation, devest an estate. 1 Inst. 251.

A warranty by tenant for life never produces the effect of devesting, though in some cases a warranty may create or enlarge a discontinuance.

The alienation must be to a stranger, or to some one not having the next or immediate estate of freehold or inheritance. Litt. 625, 626. For when the feoffment is to the next remainder-man, whether tenant for life or in tail, it will amount to a surrender. 1 Inst. 42 a, 252 a, 335 a ; 1 Rep. 76 b. But a feoffment by two persons who are successive tenants for life will devest the inheritance for the entirety, although one of them be seised of an estate of inheritance in remainder expectant on a mesne estate of inheritance. *Bredon's case*, 1 Rep. 76, and *Dyer*, 229. 334 ; 1 Inst. 251.

On the same ground it was decided in *\*Pelham's case*, [\*354]

1 Rep. 14, that a recovery suffered by a person who had an estate for life, with remainder to him in tail, after interposed estates of inheritance, was a forfeiture. The contrary, however, was held in *Smith v. Clifford*, 4 Term Rep. p. 738 ; but it is very questionable whether the last case will be followed.

Also a feoffment or fine, by a tenant for life, will amount to a forfeiture of his life estate, although he has a remainder in tail or in fee, as often as there are interposed estates between the estate for life and estate of inheritance of the grantor. *Pelham's case*, 1 Rep. 14.

When tenant for life, and the owner of the first estate of inheritance, join in a feoffment, fine, or recovery, this feoffment, &c. will be a rightful assurance. It will operate merely to pass the several estates of the respective grantors, under the former title. It will not give a *new title* depending on a new seisin ; 1 Inst. 302 a ; *Bredon's case*, 1 Rep. 76 ; Bro. Abr. Descent, pl. 64 ; and the like doctrine extends to husband and wife, when the wife is tenant for life, and the husband is tenant in tail of the first estate in remainder. *Peck v. Channel*, Cro. Eliz. 827.

Even when a tenant for life enfeoffs a person who has a remainder, after a mesne estate of inheritance, this feoffment will divest the ancient seisin, and give a fee-simple, depending on a new [\*355] seisin ; (first resolution in *Chudleigh's case*, 1 Rep. 140 ;) and even when tenant for life, and the owner under such remote remainder expectant on prior estates of inheritance, join in a feoffment, this feoffment will pass a fee-simple, by divesting the seisin, as it depends on the former estate.

The effect of a feoffment by tenant for life is to give a fee to his alienee. The fee, however, never was in him. For that reason his widow cannot be dowable even of the seisin acquired by the feoffment. 1 Roll. Abr. 676. In this particular there is a distinction between tenant for life on the one hand, and tenant for years, and tenant at will. On the other hand, the points are to be adduced for the sake of the distinction ; for when tenant for years, or at will, makes a feoffment, and thereby passes a fee, the feoffee is by estoppel precluded from denying the title of the wife of the feoffor to be endowed. See 3 Hen. IV. 6 a ; 1 Inst. 31 b ; and Hale's note, *ibid.* *Moseley v. Taylor*, sir Wm. Jones, 317 ; and Bro. Abr. Disseisin, pl. 76. The distinctions are collected in the Essay on Estates, chap. Dower, p. 555.

This learning is more important, and for that reason has invited more discussion, because many titles proceed from a person who supposes himself to be tenant in tail, while in point of fact and of law he is merely tenant for life ; and a title thus circumstanced, is to be considered as a defective title, until all persons [\*356] who are concerned in interest have released or confirmed the title, or are barred by the statute of limitations, or by nonclaim on a fine with proclamations. This is one of the many instances in which the title will be defective, although the deeds ap-

pear to carry on the evidence of the title with ease, or without difficulty.

The consequence of this species of disseisin is, that the former fee-simple, including the several estates derived out of the same, is changed into a right of entry, and there is a new estate under a new title. Thus, the remainder-men or reversioners, instead of having a seisin or estate, will not have any other interest than a right of entry, which eventually may be turned into a right of action, either by the statutes of limitation, or by a descent which tolls the entry, or by warranty; and these remainder-men or reversioners, until they have restored their seisin, cannot either grant or convey to a *stranger*, or make a *will* under their ownership; though they may bind themselves by estoppel, or may release to the *terre-tenant*; being either the freeholder or any person who has an estate in remainder or reversion, or may *confirm* his title; and various other consequences will be induced, as will appear from the general learning advanced on this subject in the argument of *Goodright v. Forrester*, 1 Taunton, p. 578. Other observations will be added on this point in considering the several \*species of disseisin, and the con- [\*357] sequences following the disseisin.

And when a *tenant in tail* conveys by lease and release, bargain and sale, grant, or any other mode, not operating as a discontinuance, or as a bar, his assignee will have merely an estate to continue as long as there shall be issue inheritable to the estate tail, *Machel v. Clarke*, 2 Lord Raym. 778.

So when the estate of a person is defeasible by a condition, or determinable by a collateral limitation, the estate of his assignee will be determinable in like manner till his estate is by release, confirmation, or some other mode, discharged from the defeasible or determinable quality.

But *tenant in fee-simple* has an unlimited power of alienation, except in particular cases, referrible to the person, as *ecclesiastics seised* in right of their church, &c. And as an exception, or as seeming to be an exception, to the rule already noticed, it is to be observed, that tenant in tail, having the immediate freehold, or with the concurrence of the freeholder, may, by a common recovery, alien his estate tail in the same manner as if he were seised of the estate in fee out of which his estate tail is derived.

So that if the person who created the estate tail was seised in fee-simple, the tenant in tail may convey the fee-simple; and if the person who created the estate tail had a determinable fee, \*or a fee subject to a condition, he may convey the fee, [\*358] subject to the like determinable or defeasible quality. See first volume of *Practice of Conveyancing*, p. 2.

In this place also it may be observed, that if to the estate tail itself there are annexed any collateral determinations or conditions, the tenant in tail may, by a common recovery, discharge his estate from these collateral qualities. See *Benson v. Scott*, 1 Mod. 108; *Page v. Hayward*, 2 Salk. 570; *Driver v. Edgar*, Cowp. 379; *Guliver v. Ashby*, 4 Burr. 1929.

Another rule flowing as a deduction from the rule already noticed, is, with the exceptions which have been stated, *cessante statu primitivo cessat atque derivativus*.

Therefore, if *A* be tenant for life, and he demise for ninety-nine years, this estate, unless confirmed by the person in remainder or reversion, will determine on the death of *A*.

The like observation is applicable to a lease or any other estate granted by a person having a particular or defeasible estate. Therefore, if tenant for years grant a rent-charge to *A* for life, *A* will have a chattel interest for so many years as he shall live.

So if tenant for life grant to another, and the heirs of his body, the grantee will have an estate of freehold, and not of inheritance; and the heirs of the body will be special occupants, and not within the protection of the statute *de donis*.

[\*359] \*But the rule is applicable only to the determination of the original estate, by its regular and proper expiration; for the derivative estate will not be defeated by the *surrender* or *forfeiture* of the original estate.

But when the original estate determines according to the terms or nature of its limitation, or is defeated by a condition, in consequence of the *act* of the party, the determination of the original estate will involve in it the determination of the derivative estate.

Thus, if *A* be tenant during her widowhood, her estate, and consequently the estate of her lessee, will determine by her marriage.

This is equally the case, if she be tenant for life, with a condition to defeat her estate on marriage, and she marry, and advantage is taken of the condition.

Also, if *A* be parson of a church, and lease the glebe or tithes, the estate of his lessee will be determined by his resignation, cession, or any other cause, by which he ceases to be parson, as well as by his death.

It is observable also, that when a person has several estates, and makes a lease, or grants an estate, or executes a conveyance, the lease or estate so granted will be derived out of the several estates; so that the estate granted by this lease or conveyance may cease as to one estate, and continue as to another estate. Thus *A* is tenant

for life, remainder to *B* in tail, remainder to *A* in fee, and [\*360] *A* leases for one \*thousand years; this lease will be derived out of the estate for life, and estate in fee; and when *A* dies the lease will be determined in respect of the estate for life, and the lease will, in respect of the fee, commence in possession on the death of tenant in tail without issue; but in the mean time the remainder in fee, and consequently the term for years derived out of this estate in fee, may be defeated by a common recovery suffered by tenant in tail.

And although *A* and *B* had suffered a common recovery in *A*'s life-time, the term would have been barred, so far as it depended on the remainder in fee.

So if *A* had been the owner of the estate tail, the lease would have

been good as against the tenant in tail during his seisin, but voidable by the issue in tail, unless barred. And though the lease had been avoided by the issue in tail, it would have remained good as to the remainder in fee, unless or until it was barred.

So a derivative estate, as a lease, or even a conveyance, may be good as to one person, and void or voidable as to another person. Of this the instances already given may be propounded as examples.

So also if *A* being married to a woman who has a title of dower, make a lease or conveyance, such lease or conveyance is good as against him and his heirs, but is voidable as against the wife; and if she, in respect of her dower, avoid the lease or the conveyance, she suspends \*the operation of the lease or convey- [\*361] ance in point of enjoyment, during the continuance of her estate in dower, and does not wholly defeat it.

For the lease or conveyance will continue, in point of estate, even as to the third part, or the particular lands of which the wife is endowed; and the right of possession will be revived on the determination of the estate of the wife.

These and the like points will be found particularly useful in applying the law to actual practice in considering the state of titles.

### *Of Tenants in Tail.*

IN regard to tenants in tail, there is the peculiarity, that by a common recovery duly suffered a tenant in tail may enlarge his estate tail into a fee-simple, provided the donor of the estate tail had a fee-simple. See first volume of *Practice of Conveyancing*, p. 1, and by that means give certainty of duration to an estate previously uncertain in that particular; and render absolute, and indefinite, an estate which was determinable.

This learning is of infinite importance. Occasions involving its application are of daily occurrence. It is the subject of all others of most general utility, because involved in the greatest nicety. Some of the many distinctions which most frequently demand attention in the consideration of titles may with propriety be noticed in this place.

\*The tracts formerly published on cross remainders, [\*362] and alienations by tenants in tail, (tracts which will be republished in the intended edition of the *Essay on the Quantity of Estates*,) will materially assist the study of the subject to be now discussed.

Conveyances by tenants in tail must be divided into,

1st, Conveyances which are rightful, and conveyances which are tortious or wrongful.

2dly, Conveyances which do, and conveyances which do not, bar the issue in tail; and

3dly, Conveyances which do, and conveyances which do not, bar the persons having estates in remainder, or reversion expectant

on an estate tail, and conditions and collateral limitations annexed to the estate tail.

Innocent or rightful conveyances by a tenant in tail are good as against himself. In some cases they are good against his issue ; in other instances they are voidable by the issue in tail. Leases for years, conveyances by lease and release, or by grant, or by bargain and sale, or by release or confirmation in enlargement of an estate, are rightful conveyances, except when a warranty is annexed to the conveyance ; and a discontinuance is effected by reason of the warranty, as the means of rendering the warranty efficient.

But a lease for years, granted by tenant in tail, or a con-  
[ 363 ] veyance from him, by lease and \*release, bargain and sale, by grant or confirmation, will determine with the estate tail, whenever that estate shall determine.

But if the estate tail become a fee-simple, then these leases and other conveyances will receive extension or confirmation by the change in the quality, or by the extension, of the estate tail into a fee simple.

In the invaluable book on Tenures, *Littleton* supposed that a tenant in tail was, for all the purposes of alienation, merely a tenant for life ; and that the grantee of tenant in tail would have merely an estate of freehold for the life of tenant in tail, and not an estate of inheritance. *Littleton*, sec. 612, 613. 650.

This is one of the very few errors to be found in that book which deservedly acquired so high a degree of reputation. This error was adopted and followed in the case of *Tooke v. Glasscock*, 1 Sand. Rep. 250.

It is rather extraordinary that the judges who decided *Tooke v. Glasscock* had not brought the real point of *Seymour's* case, (10 Rep. 95,) to their recollection. In *Seymour's* case, one of the resolutions was, that the wife of a bargainee of tenant in tail was dowable. Hence it is obvious then, that the court considered the bargainee to have an estate of inheritance, and not a mere estate of freehold. For a woman is not dowable of an estate for life or lives, though it be transmissible by special occupancy to heirs, or heirs of the body.

[\*364] \*The profession, however, ought to rejoice at the decision in *Glasscock v. Tooke*, since it led to the discussion which took place in *Machel v. Clarke*, 2 Lord Raym. 778, and called forth the elaborate judgment pronounced by Lord Chief Justice *Holt* in that case ; a case which is now the leading and prominent authority in questions of this nature.

The result is, that every conveyance by a tenant in tail, either by bargain and sale, grant or release, gives a base fee commensurate with the estate tail. Litt. § 618, 1 Inst. 332 a. And every lease, or other partial interest, being an estate in the land, or other subject of entail, granted by tenant in tail, and which gives an interest



derived out of the estate tail, will be good against the issue in tail, or voidable by them, according to circumstances.

When tenant in tail conveys by a wrongful or tortious alienation, he does not convey by virtue of his ownership as tenant in tail, but he conveys by virtue of a power confided to him by law. His tortious alienation is termed a *discontinuance*; and this word "discontinuance" emphatically describes the effect which is produced by this species of alienation. A discontinuance is the cesser of the title under the estate tail, and the commencement of a title under a new and wrongful seisin. It causes a suspension of the title under the estate tail, and gives a new estate by force of the alienation. In short, it produces an estate depending on \*a new title; discontinues the estate under the ancient [\*365] title, and gives commencement to a new title; by creating a new estate in fee-simple. The consequences produced by a discontinuance will illustrate these observations.

If tenant in tail lease for his own life, or if he make a grant by deed of grant, or by lease and release, or by bargain and sale, for the life of another person, he still retains his old estate tail, and has a *reversion* in respect of that estate. 1 Inst. 332 a. b.

So when he makes a lease by virtue of a *power*, or by virtue of the enabling statute of 32 Hen. VIII. c. 28, for three lives, he still retains a reversion by force of his estate tail.

But when he discontinues, by making a lease with livery for the life of a stranger, or for three lives; or when he discontinues by making a gift in tail by livery or by fine, he acquires a *new reversion* by force of the discontinuance. He will be seised of this reversion, as under a new title, and not under his seisin of the estate tail.

So if he take back an estate tail to himself under the discontinuance, either by means of a conveyance to uses, or by means of a conveyance and reconveyance, this will be an estate tail depending on a new title, and not the ancient estate tail.

Hence many of the decisions in the old books arising from the difference between a common recovery suffered with a single or with a double \*voucher; and hence, in part, the [\*366] reason for which, in modern practice, recoveries with double voucher are preferred to recoveries with single voucher; for when a man comes in on the voucher, in a common recovery, he is supposed to come in by virtue of all estates of which he is, or of which he and his ancestors ever were, seised; and therefore a dormant entail will be barred by the voucher of the person entitled under that entail. But when a man comes in as tenant in a recovery, and vouches over, no estate tail will be barred, except that identical estate of which he is actually seised at the time when the recovery was suffered against him as tenant.

Hence another difference; a recovery in which tenant in tail is vouched, and vouches over, will be a bar to all estates of which

he is seised in reversion, or remainder, or which he hath in point of right or title : while a recovery suffered against tenant in tail, as *tenant to the writ of entry*, will not bar any estate tail, except the identical estate tail of which he is actually seised, and which confers the right to the immediate freehold. It will not even bar an estate tail of which he is seised in remainder expectant in a remote degree on his own estate of freehold. If he had the estate tail immediately expectant on his estate for life, then the life estate would have ceased by merger, and he would be seised of the freehold by force of his estate tail, and be competent to suffer a recovery [\*367] even as tenant, \*so as to bar the estate tail and remainders by his voucher as tenant.

It is also to be observed, that a *discontinuance* cannot be made by any person in respect of an estate tail, unless he be seised, in fact or in law, by force of the estate tail ; nor unless the estate tail confer the right to the immediate freehold.

A person who has an estate tail in remainder or reversion, after an estate of freehold, or a right to an estate tail, cannot discontinue the tail. Litt. sect. 618 ; 1 Inst. 332 a. But a person who has a reversion of lands expectant on a lease for years may discontinue. 1 Inst. 332 b.

The consequence of a discontinuance, while it continues in force, is, that the issue in tail, or the reversioner or remainder-man, cannot, unless remitted, make an actual entry, or maintain an ejectment ; nor can, while the discontinuance remains in operation, make any grant, transfer, or disposition by deed or will. The person who has the right must proceed by *formedon*, which is the real action, and emphatically termed the *writ of right* of those who claim under an estate tail, or a reversion or remainder expectant on an estate tail ; or he must release his interest to the person who has the seisin or estate, or bind it by estoppel.

To constitute a discontinuance there must be a wrongful act, and the Abridgments and Digests which contain the head *Discontinuance*, should be consulted for the purpose of learning [\*368] those distinctions by which a wrongful, may be \*distinguished from a rightful, alienation by tenant in tail.

The chap. Discontinuance, in *Coke Litt.* will also be highly useful to the complete understanding of this learning ; and to read the chapter on Remitter in *Coke on Littleton* will greatly conduce to enlarge the fund of useful knowledge, and to show the instances in which the mere act of law will redress the wrong ; and by its operation revive the seisin under the estate tail.

To enlarge on all these niceties would require a volume instead of a few short observations.

A feoffment ; a fine with or without proclamations ; a common recovery, not duly suffered, as distinguished from a recovery duly suffered, and operating as a bar ; and also a warranty annexed to some particular species of conveyance, are the wrongful assurances by which discontinuances may be affected.

A lease and release, and a fine as parts of the same assurance, may also create a discontinuance. *Doe ex dem. Odienne v. Whitehead*, 2 Burr. 704. But a lease and release, as a distinct conveyance, and a subsequent fine by way of further assurance, will not cause a discontinuance. *Seymour's case*, 10 Rep. 25.

It is also worthy of notice, that when the discontinuance is effected by a particular estate, as by a lease for lives, this discontinuance may be enlarged; but unless it be enlarged, either in fee or in tail, to the same or to another \*person, the discontinuance will cease with the determination of the particular estate which was the cause of the discontinuance, though it be after the death of the tenant in tail; and the title under the estate tail will be immediately revived. Litt. § 632; 1 Inst. 333 a; Gilb. Ten. 121.

On the other hand, a discontinuance by a particular estate may be enlarged by a grant of the new reversion, Litt. §629, 630, either in tail or in fee. *Ibid*.

Fines with proclamations, and common recoveries duly suffered, are the ordinary means by which the issue in tail may be barred. They may also be barred by the provisions of particular acts of parliament; as by bargain and sale under the land-tax acts, and by statutes concerning bankrupts.

They may also be barred by the lineal warranty, with assets of tenant in tail in possession, or by the collateral warranty of tenant in tail in possession, with or without assets. Formerly they might have been barred by lineal or collateral warranty, although the tenant in tail had not been the tenant in tail in possession, *i. e.* having the immediate freehold by force of the estate tail.

It is by force of the statute of 4 and 5 Ann. c. 16, *for the amendment of the law*, that tenants in tail are restrained from barring the issue in tail by collateral warranty, except when they are tenants of an estate in tail in possession; \*and consequently [\*370] competent to suffer a valid recovery.

The issue in tail may also be bound by leases, jointures, and other estates, &c. granted by force of a power in the deed creating the entail. They may also be bound by leases made pursuant to the provisions of the enabling statute of 32 Hen. VIII. c. 28.

In all cases of powers duly pursued, the inheritance may descend to the issue, subject to the estates and charges created under the power, and the issue will be entitled to the rents reserved by such leases, &c.

Unless the issue are bound or barred by the assurances of tenant in tail, it will be to be considered whether the assurance be void or voidable only, as against the heirs in tail.

Most assurances are voidable only, and of course, the issue must enter, or claim, to avoid such assurances. For when the assurances are voidable only, each succeeding heir in tail, under the entail, may give confirmation to the assurance as against himself.

A title which is defective, or voidable as against the issue in tail.

may also become good against all the heirs in tail by a fine with proclamations duly levied; and against them, and the persons entitled in reversion and remainder, by a common recovery, duly suffered, by the tenant in tail, or heir in tail for the time being.

If tenant in tail make a lease for years, or for lives, [\*371] without being warranted by any power, \*or make a settlement by lease and release, without fine or common recovery, this lease or settlement will be voidable by his issue; but if afterwards a fine be levied, with proclamations, or a common recovery be duly suffered, either by the lessor or settler, or even by the heir in tail, before he has avoided the lease or settlement, the lease or settlement will be affirmed, even although there was not any intention to give validity to the same. See *Cheney v. Hall*, Amb. Rep. 526; *Stapleton v. Stapleton*, 1 Atk. 2; and *Doe dem. Shilston v. Mead*, 3 Burr. 1703.

All these cases, and many others of the same class, proceed on the ground that the estate granted by the lease, or the estate limited by the settlement, is derived out of the estate tail; and as soon as the estate tail is discharged from the rights of the issue under the statute *de donis*, the lessee, or person claiming under the settlement, will have a good title against the issue. And, notwithstanding the rule *cessante statu primitivo*, &c. and notwithstanding a grant by a tenant in tail, by lease and release, passes only a base fee, yet this base fee may be converted into a fee-simple, by a common recovery afterwards suffered by the donee, or by the heir, when heir under the entail.

*Beaumont's* case, 9 Rep. 138, and *Baker v. Willis*, Cro. Car. 476, are cases of importance to the subject now under consideration; and when properly understood, will illustrate the [\*372] \*learning respecting the bar of issue under an entail.

In this instance, (for both cases arose on the same gift in different stages of the title,) the gift was to two persons, and the heirs of their bodies, and a fine with proclamations was levied by one of them; and it was declared that the fine barred the issue in tail; and yet it left to the other ancestor her full ownership.

But this ownership was, by the operation of the fine, changed from an estate tail into a base fee, descendible to the heirs general in exclusion of the heirs in tail; and yet it should seem that the donee under the entail retained the power of suffering a common recovery, and of barring the remainder or reversion expectant on the estate tail. See *Errington v. Errington*, 2 Bulstr. 42.

It was agreed that the issue might take by descent, under the rules of the common law, although they were by the operation of the fine excluded from taking *per formam doni* under the entail.

As a caution against mistake, it is to be observed, that the gift was to two persons (being husband and wife,) and the heirs of their bodies, and they took by entirety; so that they were neither joint-tenants, nor tenants in common; and neither of them could alien to the prejudice of the other of them: and yet, under the compre-

hensive terms of the statute of proclamations of fines, 4 Hen. VII. \*c. 24, one of them might alien by fine with [\*373] proclamations, so as to bar the heirs under the entail.

In examining the effect of fines with proclamations, with reference to the issue in tail, the language of the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, must be consulted.

The rules of the common law are not of any avail, as a guide to ascertain the effect of assurances by persons claiming under gifts in tail, and levying fines with proclamations. The cases which have received the determination under these statutes are the only authorities which can be safely relied on for understanding the effect of these statutes.

*Sheppard's Touchstone*, chap. Fines : *Cruise's Essay on Fines*, chap. 10 ; and the *Treatise on Conveyancing*, Vol. I. p. 220, will afford to the student a general outline of the cases which have been decided under the construction of these statutes.

All grants, or *innocent conveyances* from tenant in tail, will pass estates to determine on the death of tenant in tail, and the failure of his issue inheritable under the entail.

As against the persons in remainder or reversion, assurances of this description will not produce any effect whatever.

The remainder-man or reversioner will continue in the seisin of his reversion or remainder ; and on the determination of his estate tail, and consequently in the absence of a common \*re- [\*374] covery, the person having the reversion or remainder will be entitled to enter into, and to take the possession of, the lands.

And even a lease for lives, under the enabling statute of 32 Hen. VIII. c. 28, is to be considered as derived out of the estate tail, and it will determine as soon as the estate tail shall determine.

But an estate derived under a power, in a settlement by the owner of the fee-simple, and given to tenant in tail, will, unless the contrary be stipulated, continue after the determination of the estate tail. Still, however, the remainder or reversion will be a continuing seisin or estate, subject to and expectant on the estate tail while it continues ; and afterwards subject to and expectant on the particular estate granted by virtue of the power ; and in reference to the estate created by virtue of the power, will be, or be of the nature of, a reversion.

And in this place it may again be noticed, that a lease for lives, granted by tenant in tail, and warranted by the statute of 32 Hen. VIII. c. 28, will not be a discontinuance, so as to divest or discontinue the estate tail, or the remainder or reversion. 1 Inst. 333 a.

On the other hand, when tenant in tail, seized of the freehold by force of the entail, does, by lease with livery of seisin, or by feoffment or fine, with or without proclamations, or common recovery, grant an estate to continue beyond his own life, this conveyance will have the \*effect of discontinuing the reversion or [\*375] remainder, and turning such reversion or remainder into a right of action ; and this is a wrong which cannot be redressed merely by entry. It must be remedied either under the learning of remit-

ter, or by the cesser of the discontinuance ; or must, after the determination of the estate tail, be redressed by judgment in an action of *formedon*.

And while the remainder-man or reversioner has merely a right of action, he is precluded from all power of alienation to a *stranger*, except so far as he may bind his interest by estoppel ; and it should seem that every estoppel, except it be for years, will, instead of benefitting the donee or grantee in the instrument, operating by way of estoppel, be beneficial to the terre-tenant or wrongful owner, and have the effect of giving confirmation and stability to his title. See *Weale v. Lower*, Pollexf. 54 ; 1st Vol. of *Practice of Conveyancing*, 208.

Every discontinuance is not a bar.

The estate of the remainder-man or reversioner may be converted into a mere right of action ; and yet that right may ultimately be redressed by the operation of law, or by the action of the party.

The right, however, may be barred by non-claim, on a fine with proclamations, or by the statute of limitations, of 21 James I. c. 20.

The more general and more important point is, that the donee in tail, or the heir in tail, provided the entail ever gave a vested [\*376] interest, \*may, by a common recovery duly suffered, and adapted to the particular circumstances of the case, bar the right under the remainder or reversion, although it has not any continuance as a seisin, or as a right.

The extent of the power of alienation by tenant in tail, &c. is a subject of frequent recurrence, and of great importance to titles. The learning forms a large and comprehensive branch in the law ; and the numerous points of distinction, and the exceptions which this learning involves, will be found in *Sheppard's Touchstone*, chap. Recoveries ; Mr. *Cruise's Essay on Recoveries* ; and the first chapter of the *Practice of Conveyancing* ; and Tracts on Alienations by Tenants in Tail.

#### *Of the Degrees of Ownership conferred by different Estates.*

THE degrees of ownership conferred by different estates, and such practical observations as arise with reference to the different estates, or the alienation by persons being the owners under or through the medium of these estates, will next be considered.

In the Essay on the Learning of the Merger of Estates, 3d Vol. of *Practice of Conveyancing*, p. 108, there is an examination of the gradation of estates, or of their relative measure or extent, on a comparison of different estates with each other. The study of this subject will be found highly interesting, and useful in practice.

#### [\*377] *\*As to Tenants of Estates in Fee-simple.*

A TENANT in *fee-simple* may grant any less estate, or charge his estate in any manner he thinks fit, or annex to it any conditions he pleases ; so as such conditions be not repugnant to the rules of law ; and so as they do not contravene the law against perpetuities.

And the owner of this estate may either transfer the entire fee, or he may divide it into portions, or particular interests; as to *A* for years, remainder to *B* for life, remainder to *C* in tail, remainder to *D* in fee, with or without charges by way of rent to other persons. The maxim is, *Cujus est dare ejus est disponere*; 2 Rep. 71. *Cui licet quod majus non debet quod minus non licere*; 4 Rep. 23.

And he may make a conveyance to uses, so as to raise uses on the seisin of his assignee; or he may covenant to stand seised to uses; or may make a bargain and sale; so as to raise uses on his own seisin.

Of the nature and qualities and extent of this estate, see *Essay on Estates*, chap. Fee-simple.

#### *As to Tenants of Base and Determinable Fees.*

THE like observations are applicable to the owners of estates of this description, with the exception, that, while the estate continues determinable, an estate derived out of this \*deter- [\*378] minable estate will be subject to the same collateral determination.

The rule in this instance also is *cessante statu primitivo, &c.* But when the estate shall no longer be determinable, then the estates derived out of this fee will, as far as respects such determinable quality, become absolute.

These observations are equally applicable to the tenants of those estates in fee, which are subject to a condition, *mutatis mutandis*, merely substituting the word defeasible, as more appropriate than the term determinable.

#### *As to Tenants of Conditional Fees.*

THESE tenants are to be distinguished from the tenants of estates in fee, subject to a condition. The law applicable to these conditional fees does not seem to be precisely defined.

As against himself and his heirs, the alienation of the tenant of this estate will be good even before issue had.

But according to the more prevailing authorities, the tenant of a conditional fee cannot alien so as to defeat the condition of the donor, unless he have issue before or after the alienation.

On this subject, a detailed discussion will be found in the chapter on conditional fees in the *Essay on the Quantity of Estates*.

At this day there cannot be a conditional fee in any property except copyhold lands, not \*admitting of entails; [\*379] and in such hereditaments as are of a personal nature, and not charged upon or issuing out of real estate. Of this description are annuities not being rent-charges; annuities chargeable on the

post-office duty, and the like annuities, are examples. *Earl Stafford v. Bulkley*, 2 Ves. 171.

Lord *Hardwicke* seems to have been surprised into a mistake, when he supposed that there could not have been any remainder at the common law after a gift to a man and the heirs of his body.

### *As to Tenants in Tail.*

THIS is a copious head, and of the first importance in the deduction of titles. A title is more likely to be defective, from some cause connected with estates tail, than for any other reasons, and indeed for all causes whatever.

The power of alienation for tenant in tail may be considered.

1st, With reference to himself.

2dly, With reference to his issue.

3dly, With reference to those in reversion or remainder, and persons having interests by executory devise.

4thly, In reference to estoppels.

And it will be proper to sum up the different effects of deeds, fines, recoveries, *discontinuances*, and warranties by tenant in tail.

All alienations, and all charges by a tenant in tail, will [\*380] be good against himself, \*exactly in the same manner, except as to the extent and degree of interest, as if he were seised in fee-simple; and if he should acquire the fee-simple by means of his estate tail, then as if he had, really and in truth, been seised in fee-simple.

For many purposes he is to be considered as tenant in fee-simple; since he may acquire that estate by suffering a common recovery; alone when he has the freehold; and when the freehold is in any other person, then with the concurrence of the person in whom the freehold is vested.

The right, however, of suffering a common recovery, is a privilege personal to the tenant in tail, or to the person on whom the right of entail shall for the time being have devolved as heir to the entail, or the person on whom the entail if existing would have devolved.

For all the purposes of the following observations, the issue in tail, when they become the heirs in tail, are to be considered in the same predicament, and as having the same powers as tenants in tail.

A lease, or grant by tenant in tail, will bind himself, and will continue in force till avoided, when it is voidable by the entry, or action of the issue, or till the determination of the estate tail out of which it is derived.

Some conveyances, as feoffments, fines, and also releases or confirmations with warranty, by tenants in tail, create a discontinuance.

Other assurances operate as conveyances, \*and pass merely an estate or interest, derived out of the estate of



tenant in tail ; and consequently are determinable, and will determine when that estate shall have filled the measure of its duration.

A common recovery, when it is duly suffered, is rather a conveyance by tenant in tail, than a discontinuance ; and yet it is generally treated as a discontinuance.

A recovery operates, in a proper sense, as a discontinuance only when it passes a fee-simple, without barring the issue, or, as a consequence, the reversion or remainder ; as in the instance of a recovery, in which there is not any voucher over by the tenant in tail.

When a discontinuance is made, the fee-simple passes, and cannot be restored without action, or remitter.

When a conveyance is made, the estate will be good against a tenant in tail, but (unless the issue shall be barred,) by the original or by some subsequent assurance, will be voidable by them ; and unless the persons in reversion or remainder shall in like manner be barred, the conveyance will be actually void against them, under the rule *cessante statu primitivo*, &c.

But when a discontinuance is effected, the estate of tenant in tail, and of those who had the reversion or remainder, will be turned into a right of action ; and while the discontinuance remains in force, the new estate will subsist until avoided by the action of the issue in tail, or of the persons in reversion or remainder ; \*or until the remitter of the issue in tail, or of the [\*382] persons in reversion or remainder, or the determination of the discontinuance.

An estate granted by a tenant in tail may at different times have different qualities, partaking of the qualities of the estate out of which it is derived.

For example, if *A*, being tenant in tail, lease for 1,000 years, *A* will have an estate for that term, determinable when the estate tail shall cease.

When therefore this tenant in tail dies without issue inheritable under the entail, and without having barred the estate tail, the term will determine. It will determine, because by the failure of the issue inheritable to the estate tail there is an end to the ownership under the estate tail.

This is equally true of a conveyance in fee by tenant in tail, either by grant, lease and release, bargain and sale, or covenant to stand seized to uses.

All such conveyances are also voidable by the issue in tail, unless their right of succession shall be barred.

But if the issue should be barred by a fine with proclamations, or bound by a warranty, or by a common recovery, the conveyance will be good as against the issue ; and after a common recovery shall be duly suffered, the conveyance will be good against the issue in tail, and those in reversion and remainder.

Thus an estate, which originally was voidable, \*may be- [\*383]  
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come indefeasible ; and an estate which originally was determinable, may eventually become absolute.

It may also, by means of a fine with proclamations, become valid against the heirs in tail. It may afterwards, by means of a common recovery, become effectual against those in remainder and reversion.

Formerly the alienation of tenant in tail by grant, &c. was considered as good only during his life. In short, the interest which passed by his conveyance was considered as determinable on his death, so that it would then *ipso facto* determine.

The language of that excellent text writer, Litt. § 612, is,

“Also, if tenant in tail grant his land to another for term of the life of the said tenant in tail, and deliver to him seisin, &c. ; and after by his deed he releaseth to the tenant and to his heirs all the right which he hath in the same land, in this case the estate of the tenant of the land is not enlarged by force of such release ; for that when the tenant had the estate in the land for term of the life of the tenant in tail, he had then all the right which tenant in tail could rightfully grant or release ; so as by this release no right passeth, inasmuch as his right was gone before.”

And in § 613 ;

“Also, if tenant in tail by his deed *grant* to another all his estate which he hath in the tenements to him entailed, to have [\*384] and to hold \*all his estate to the other and to his heirs for ever, and deliver to him seisin accordingly ; in this case the tenant to whom the alienation was made hath no other estate but for term of the life of tenant in tail. And so it may be well proved that tenant in tail cannot grant nor alien, nor make *any rightful estate* of freehold to another person, but for term of his own life only.”

And in § 650 ;

“In the same manner it is where tenant in tail grant all his estate to another ; in this case the grantee has no estate but for term of life of the tenant in tail ; and the *reversion* of the tail is not in the tenant in tail, because he hath granted all his estate, and his right, &c. And if the tenant to whom the grant was made, make waste, the tenant in tail shall not have a writ of waste, for that no reversion is in him. But the reversion and inheritance of the tail, during the life of the tenant in tail, is *in abeyance*, that is to say, only in the remembrance, consideration, and intelligence of the law.”

Lord Coke adopted rather than dissented from this doctrine.

But in *Seymour's* case, 10 Rep. it was determined that a bargainee of a tenant in tail had an estate of which his wife might have dower ; consequently the bargainee must have had an estate of inheritance, and not merely an estate for the life of the tenant in tail.

But even the report of *Seymour's* case is calculated to [\*385] mislead, since it treats the \*bargainee as having had an estate descendible to his heirs, *determinable by the death of tenant in tail*.

The language of the report led to the mistake in *Tooke v. Glasscock*, 1 Saund. 250, in which the court held, that the bargainee of tenant in tail has merely an estate *pur autre vie*, and that the heirs were to take as special occupants; so that at that period, viz. before the law was altered by the statute of Frauds and Perjuries, 29 Car. II. c. 3, the bargainee had not any devisable estate.

But in *Machel v. Clarke*, 2 Lord Raymond, 778, (a case deserving particular attention, as elucidating the law on this point, with all its numerous distinctions,) Lord Holt declared the law on this subject; and it was finally settled that the bargainee of tenant in tail has an estate of inheritance, which will continue as long as the estate-tail shall continue, or till it shall be avoided by those who have a right to avoid the same. Butler's Co. Litt. 331.

The material observations of Lord Holt, and the distinctions which he took, were, that though there are many authorities in the point, yet the reason given in the reports of them is not clear, and therefore he would give at large the reason of his present opinion; and he observed, "it has been made a question, if tenant in tail "bargains and sells, or leases and releases, or covenants to stand "seised of the lands entailed to another in fee, whether the estate "conveyed by the said conveyances determines by the "death of the tenant in tail, or whether it \*continues [\*386] "until the actual entry of the issue in tail." And he held that such estate continues \*until the actual entry of the issue in tail, for these reasons;

"1st, Because tenant in tail himself has an estate of inheritance in him; and before the statute *de donis*, Westm. 2, 13 Edw. I. c. 1, it was held, that such estate was a fee-simple conditional; then the statute made no alteration as to the tenant in tail himself, but only makes provision, that the issue in tail shall not be disinherited by the alienation of his ancestors; and by Coke Litt. 18 a. it appears that a base fee may be created out of an estate-tail; where it is said, that if a gift in tail be made to a villein, and the lord enters, he hath a base fee. Then if a base fee may be created out of an estate-tail, there is great reason that the bargainee, &c. of tenant in tail should have it.

"2dly, The tenant in tail has the whole estate in him; and therefore there is no reason why he cannot divest himself of it by grant, bargain and sale, &c. since the power of disposition is incident to the property of every one.

"3dly, It is no prejudice to the issue in tail, and therefore no breach of the statute *de donis*. Indeed there are strong words in the act for restraining alienations to the prejudice of the issue in tail, where it says, *quod finis ipso jure sit nullus*, &c.; yet the construction of the said words hath always been that the entry of the issue is tolled by such fine, and he is driven to his *formedon*; therefore, if an act which drives \*the issue in tail to [\*387] his *formedon* will not be a breach of the statute, much less

will it be a breach of the statute to drive the issue in tail to enter, to avoid a bargain and sale by his ancestor.

"As to authorities, 10 Co. 95, *Seymour's case*, is in point; where it is held, that the bargainee of tenant in tail has a descendible estate, of which his wife shall be endowed; and that a fine afterwards levied by tenant in tail barred the issue in tail, but did not enlarge the estate of the bargainee; the estate-tail being before converted into a base fee by the bargain and sale. And if the fine there had enlarged the estate it would have created a *discontinuance*, and then the collateral warranty had been a bar to him in remainder.

"In 3 Coke 84, in the case of *finer*, the case of Litt. sec. 613, is put and considered; and there it is held, that the words ought not to be literally understood, but in another sense. The words of *Littleton* are, [*N. B.* the quotation is erroneous] 'That if tenant in tail grants *totum statum suum* to *I. S.* and his heirs, and makes a livery of seisin to *I. S.* yet the estate of *I. S.* is determined by the death of the tenant in tail.' But this ought to be understood, that it is no discontinuance, but will drive the issue in tail to enter to avoid it. Tenant in tail of a rent or common grants it in fee, the grant does not determine by his death, but at the election [\*388] of the issue in tail; and therefore, according to the case put in the case of *finer*, if a warranty be annexed to the grant, and the issue in tail brings a formedon, the warranty will bar him. Winch, 5. Tenant in tail bargains and sells his land to *I. S.* in fee; *I. S.* sells to the issue in tail, being of full age, then tenant in tail dies, and the question was, whether the issue in tail was remitted? and *Hobart* held that he was; *Hutton* and *Warburton* held the contrary. But the question supposes that the estate of *I. S.* continued after the death of the tenant in tail. Bridgm. 92, accord. If tenant in tail makes a lease for years, not warranted by 32 Hen. VIII. c. 28, the issue in tail must enter to avoid it; and if he accepts rent become due afterwards, that will make the lease good as to him, which could not be if the lease was actually determined by the death of tenant in tail. In cases of exchange, the estates exchanged must be equal in quality; and yet tenant in tail may exchange his lands with tenant in fee of other lands, and it will be a good exchange till it be avoided by the issue in tail. Coke Litt. 51 a. And in the said case, the tenant in tail passes a fee by the word exchange, without livery of seisin, and it does not amount to a discontinuance, Coke Litt. 332 a. but it passes only a base fee; and if the heir in tail will avoid it, he must waive the lands given in exchange; for if he occupies them he [\*389] will be bound for his life. For, if he had not a fee the exchange had not been good, because the estates had not been equal.

"2. Though tenant in tail, by bargain and sale, lease and release, or covenant to stand seised, may create a base fee, yet in this case [of *Machel v. Clarke*,] the tenant in tail did not create a base fee

by his covenant to stand seised, because an estate made by tenant in tail, which will not take effect till after his death, is void. If tenant in tail make a lease for years, to commence after his death, it is void in its creation." Dier, 279, pl. 7: Cro. Ja. 455, *Lady Griffin v. Stanhope*.

*Objection.* He has here made himself tenant for life.

*Answer.* That will not alter his estate, unless for the sake of the remainders; as, if tenant in fee covenants to stand seised to the use of himself for life, it is void; but a covenant to stand seised to the use of himself for life, remainder to *I. S.*; or to the use of himself in tail, will be good for the sake of the entail, or of the remainder. But here the remainder is *ipso facto* void\*, and therefore will not make the estate for life good, which otherwise would be void also. The reason why an estate made by tenant in tail, to commence after his death, is void, is, because then the issue has a \*right paramount, per formam doni. There is express [\*390] authority in this case, 2 Coke, 52; Cro. Eliz. 279; Yelvert. 51; Moor, 883; 1 Leon. 110; 1 Anders. 291; 3 Leon. 291; Cro. Eliz. 895, *Beddingfield's* case. Which last book seems to give the true reason, viz. because the estate there was to commence after the death of the tenant in tail: But an estate granted by tenant in tail, which must, or which by possibility may, commence in the life of the tenant in tail, is good. He said further, that the case of fines, (3 Coke, 84,) supported him in maintenance of this opinion against *Littleton*; and *Hob.* 399, says that *Littleton* was confounded in himself when he held, that a grant of *totus status unus* by tenant in tail, put the tail in abeyance; all the books agree that the inheritance is out of the tenant in tail; and in the same place *Hobart* says that the law abhors abeyance; therefore the inheritance must be rather in the releasee than in abeyance.

*Objection.* 1 Saund. 260, *Tooke v. Glasscock*, it is held, that if tenant in tail bargains and sells his land in fee, the bargainee has an estate but for the life of tenant in tail; for a devise by him is adjudged void, because tenant *pur auter vie* cannot devise by the statute of Hen. VIII. of wills.

*Answer.* The case of *Tooke v. Glasscock* is not law; for there the tenant in tail, after the bargain and sale, and the death of the bargainee, levied a fine to a stranger; and it is \*held there, that the fine enured to the benefit of the heir [\*391] of the bargainee; but that is impossible; for if tenant in tail bargains and sells to *I. S.* in fee, and thereby an estate *pur auter vie* only passes, viz. for the life of the tenant in tail, and that descends to the heir of the bargainee, but as special occupant, the fine levied to a stranger cannot change his estate *pur auter vie* into an estate of inheritance; for there is no instance in the law, that a fine levied to a stranger can increase, but it may extinguish, a right;

\* Because it was to commence after the death of tenant in tail, and no previous estate was limited for his life.

therefore the case of *Tooke v. Glasscock* is contradictory in itself, and hath no reason to support the resolution given.

Upon the whole matter he held,

"1st, That if tenant in tail conveys the lands entailed by bargain and sale, lease and release, or covenant to stand seised to the use of another in fee, and dies, a base fee passes by the conveyance, and the estate continues until it be avoided by the issue in tail by entry.

"2dly, That if tenant in tail covenants to stand seised to the use of the covenantee for life, remainder to *I. S.* in fee, or to the use of *I. S.* for life, remainder to *I. N.* in fee, the remainder is good till avoided by the entry of the issue in tail; although tenant in tail dies before the remainder takes effect, because the estate for life takes effect immediately, and the remainder might, by possibility, have taken effect in the life of the tenant in tail.

[\*392] "3dly, If tenant in tail leases and releases to *\*I. S.* in fee, to the use of himself for life, remainder to *I. N.* in fee after his death; this remainder is good, though it is to commence after the death of the tenant in tail, because it arises out of the estate of the releasee, which estate would have been good till avoided by the entry of the issue in tail.\*

"4thly, That in this case, the estate being raised by the covenant to stand seised without transmutation of the possession, or any alteration of the estate made, except the remainder, which is void, [it being a covenant by tenant in tail to stand seised to the use of *himself for his own life*, with remainders over,] and therefore works no alteration of the estate-tail, the recovery was good, and docked the entail, and the new uses limited upon it well arose; and therefore that the judgment of the Common Pleas ought to be affirmed."

From the observations already offered to the reader, it will be collected, that an alienation by tenant in tail, though originally voidable, may eventually become absolute, either against his issue, or, according to the nature of the conveyance, against those in reversion or remainder.

Thus, if tenant in tail make a lease or settlement, and afterwards levy a fine with proclamations, the lease or conveyance will become good as against his issue; and if he suffer a [\*393] \*common recovery (and he may suffer a common recovery if the freehold be in him as it was in the case of *Goodright v. Mead*; *Machel v. Clarke*, 2 Lord Raym. 778; 3 Burr. p. 1703; or if he obtain the concurrence of the freeholder,) the lease or settlement will become good against those in reversion or remainder.

It is observable, however, that a common recovery of a tenant in tail will not be effectual against any persons in reversion or remainder, except those who claim under the estate out of which the entail itself was derived.

\* The limitation would also be good, although no estate for life were limited.

To elucidate these observations ; suppose *A* to be tenant in fee-simple, and to create an estate tail with divers remainders over, with or without leaving the reversion in the settler : as the tenant in tail has an estate derived out of the fee-simple, his common recovery will enlarge his estate into a fee-simple.

But if the estate-tail had been derived out of a determinable fee, or a fee subject to a condition, or out of an estate-tail, never effectually barred, so as to enlarge the original estate-tail into a fee-simple, a recovery by the owner of this derivative estate-tail will not, in right of such derivative estate-tail, have any other effect than to bar the reversion, or remainder in fee, of the person by whom the estate-tail was created, and of all persons claiming under him.

But even as against the issue of the donor, unless barred, the estate gained by such common recovery will be voidable in the same \*manner as the derivative estate-tail itself was [\*394] voidable.

On this point, see Tracts on Alienations by Tenant in Tail, and vol. I. of *Practice of Conveyancing*.

With this qualification, the operation of a common recovery by tenant in tail is to bar the estate-tail, and all conditions and collateral limitations annexed to that estate, and to enlarge the same into a fee-simple.

The right, however, of suffering a common recovery is, as already noticed, a privilege personal to the donee in tail, and his heir in tail, when heir.

A recovery may be suffered by a tenant in tail, either in possession, reversion, or remainder ; and in each instance it will have the effect of converting the estate-tail into a fee-simple, or rather into a fee commensurate with the estate of the person by whom the entail was created.

It may even leave intermediate estates, namely, subsequent to the estate of freehold, and prior to the estate of the tenant in tail, by whom the recovery is suffered, in the same condition as if no recovery had been suffered.

And the fee acquired by such recovery may be barred by a recovery afterwards suffered by the tenant of a prior estate-tail.

And a recovery suffered by a person who has the *right of an estate-tail* once vested, and which has been divested or discontinued ; and, (according to the opinion now universally adopted,) even by the heir in tail, after the estate-tail has \*been barred by fine, or the heirs are bound by warranty, [\*395] will have the effect of completing the title as against the issue in tail, and all persons in reversion or remainder. An ample discussion on this point will be found in Fearn's Post. Works, p. 442.

But a person who has a *contingent interest* in tail, or an interest by way of entail in an executory state, as under an executory devise, or a springing or shifting use, cannot suffer a common re-

covery with effect, so as to bar either the issue in tail, or those in remainder or reversion.

Nor will a recovery by the heir apparent, or a presumptive heir within the line of entail, or by the person who may afterwards become the heir in tail, have any effect by means of a common recovery, to bar the issue in tail, or the reversioner or remainderman.

Nor can the bargainee or feoffee, or other assignee of a tenant in tail, bar the estate-tail, or the reversion or remainder, by suffering a common recovery.

Nor will the recovery of a grantee of the crown, having the ownership under an estate-tail, by reason of forfeiture for treason, bar the reversion or remainder expectant on the estate-tail.

To these general observations there is an exception under the bankrupt laws ; for a bargain and sale by commissioners of bankrupt, enrolled within six lunar months, will have precisely the same effect on the estate-tail, remainders or reversions, as a fine [\*396] levied, or \*recovery suffered by tenant in tail would have had.

It follows, that when tenant in tail has only an estate-tail in reversion or remainder, after an estate of freehold, a bargain and sale will have the like effect only as a fine.

That the bargain and sale of the commissioners may enlarge the estate-tail into a fee-simple, the tenant in tail must not only have an estate-tail ; he must also have the immediate freehold, either distinct from or as part of his estate-tail.

It is agreed, that when the bankrupt has the immediate freehold, and also a remote remainder or reversion in tail, then, as he might have suffered an effectual recovery, a bargain and sale by the commissioners will have the effect of a common recovery.

So if the bargain and sale be deferred until the estate of the bankrupt confer a right to the immediate freehold, no doubt is entertained respecting the operation of the bargain and sale to pass the entire fee-simple, as a recovery suffered at that time would have done.

But if a bargain and sale be made, and it operate as a fine, doubts are entertained whether a subsequent bargain and sale, when the tenant in tail might have suffered a recovery with effect, will have the operation of a recovery.

The point also, whether a bargain and sale, under a joint commission against the father, tenant for life, with remainder [\*397] to the son in tail, \*will have the effect of a common recovery, is now [1818] depending for decision.

These several points are more fully discussed in a former page.

It is also to be observed, that a recovery suffered by tenant in tail will not bar any leases, charges, or encumbrances affecting the estate-tail itself. (*Cape's case*, 1 Rep. 66 a.) It will however bar all conditions and collateral limitations annexed to the estate-



tail, and all charges which partake of the nature of collateral limitations, and also all charges derived out of the reversion or remainder.

To distinguish, with accuracy, such charges as may be, from those which may not be, so barred, is extremely difficult.

On this head the following observations may be useful :

1st, When a gift is to *A*, and the heirs of his body tenants of the manor of Dale ; or,

To *A* and the heirs of his body, while a tree shall stand ; or,

To a man and the heirs of his body, provided and upon condition that he shall marry a woman of a particular name, or a particular woman ; or,

To a man and the heirs of his body, with a conditional limitation to shift the estate, unless he take the name or bear the arms of the testator ; in all these and the like instances a recovery duly suffered by the tenant in tail will bar the condition or collateral limitation.

See *Benson v. Hodson*, 1 Mod. 108 ; *Page v. Hayward*, [\*398] 2 Salk. 570 ; *Driver v. Edgar*, Cowp. 379 ; *Gulliver v. Ashby*, 4 Burr. 1929.

The cases which afford a doubt are of this description ; viz. they give rise to a question, whether there is a charge affecting the estate-tail, or whether the charge is collateral or subsequent to the estate-tail.

The recovery is an acknowledged bar to the charge, when it is subsequent to the estate-tail, or collateral to it ; while the charge, if it encumbers the estate-tail, will remain, notwithstanding the recovery.

Some cases which invite the discussion of this point, are so nicely balanced, that in the absence of decision it is impossible to state the application of the law to these cases.

An instance of doubtful solution may be exemplified by a gift to *A* for his life, with remainder to such of his children as he shall appoint, and in default of appointment to his first and other sons in tail.

It is agreed that the estate-tail becomes vested, and that it remains subject to the power of appointment till that power is exercised.

The difficulty is to decide whether the power, and the estates to arise under the exercise of the power, are a charge on the estate-tail, or whether the power is subsequent and collateral to the estate-tail.

Hence the difficulty in deciding on the effect \*of a re- [\*399] covery by tenant in tail, as against the power.

The point depends on the question, whether the power is collateral to the estate-tail, and in some degree subsequent to it ; or whether it is a charge on the estate-tail itself, and concurrent with the same ; or, in other words, runs with the estate-tail ; and though it is agreed that a recovery will bar all remainders and reversions dependant on an estate-tail ; *Cape's* case, 1 Rep. 61, b ; *Cholmley's* case, 2 Rep. 52 ; and all conditions subsequent, and collateral limitations annexed to the same, yet as it has been shown, it will not bar any

estate prior to or derived out of the estate-tail, or any charge affecting that estate.

Now, whether this power be of the former or of the latter description is not quite settled ; and gentlemen, whose experience and information cannot be too highly valued, differ on this question.

Some class the power under the former description ; others refer it to the latter description.

The gentlemen who support the former of these opinions contend, that the estate-tail is vested, subject only to be divested by an exercise of the power : they therefore conclude that the power is subsequent, and collateral to the estate-tail, and not a charge on that estate. They further urge, that this, if a charge, is no otherwise a charge than any other limitation which is to defeat the [\*400] estate-tail, or than any condition which is annexed to the estate-tail ; and there is so much legal reasoning in these arguments, that they are unquestionably entitled to considerable weight ; but the Profession are not generally convinced by this reasoning ; and many gentlemen still contend, that the court would treat the power as a charge on the ownership of the estate-tail as a charge or power which runs with the estate ; see *Ambl. 328 ; Capel's case*, 1 Rep. 66 a ; so as to place it beyond the power of the tenant in tail to bar the same.

Indeed, the more prevailing opinion now is, that the estate-tail is charged with the power, and with the estates to arise under the execution of the power ; and that the power while in *feri* cannot be barred by the recovery of the owner of the estate-tail. Estates arising under the execution of the power would certainly have priority over the estate-tail, or be substituted for it ; but that argument is not conclusive.

The right of taking under the power may be released, or may be barred by the fine of the persons who are the objects of the power.

From *Pells v. Brown*, Cro. Jac. 590, it is sometimes inferred that no estate which is to commence by executory devise can be barred by common recovery.

The point of that case is only, that *tenant in fee* subject to an executory devise cannot bar the executory devise by a common recovery, or by any other means.

[\*401] \*An estate tail may be subject to an executory devise, as in the instance of a gift to *A* and the heirs of his body ; and if, without providing for the failure of his issue, he should depart this life under the age of twenty-five years, then his estate to cease, and the lands to remain to *B* and the heirs of his body, or to *B* for years, for life, or in fee. A recovery suffered by *A* while tenant in tail, viz. before twenty-five, would bar the executory devise, so as to complete the title, although he should not attain twenty-five ; for, as already noticed, it is a principle, that the recovery of a tenant in tail will bar all conditions and collateral limitations annexed to his estate tail ; and these interests, by executory devise, are of that description.

In short, all conditional limitations in wills, which are to take effect in derogation or in abridgment of a prior estate tail, are either executory devises, or, if there be a devise to uses, (for such uses, are, precisely for this purpose, of the same description,) *shifting uses*.

In *Driver v. Edgar*, Cowp. 579, it was argued, that there could not be any executory devise after an estate tail. This proposition however, is not warranted by principle, and it is contrary to the decision in *Stevens v. Stevens*, Cas. T. Talb. 228.

In short, every limitation in a will giving a future interest, which cannot operate as a remainder, and still is effectual, must of \*necessity be supported under the doctrine of executory [\*402] devises, or future springing uses, or shifting uses.

That a recovery may be effectual as a bar, to the extent and in the manner which has been assumed, there must be,

1st, A good tenant to the præcipe or writ of entry :

2dly, The tenant in tail must vouch over the common vouchee :

3dly, In some cases he himself must be vouched :

And in investigating titles by means of abstracts, care must be taken that all these circumstances concur, before a title derived from tenant in tail is considered as a good title to the fee-simple.

*Piggott and Cruise on Recoveries* ; *Comyns's Digest*, title *Estates* ; and the 1st volume of the *Practice of Conveyancing*, chap. 1, will afford all the information necessary for understanding the general outline of this highly useful, and at the same time intricate, head of the law.

### *As to Fines.*

THAT a fine by tenant in tail may be good as against his issue, it must be *with proclamations*.

The fine of a donee in tail with proclamations will bar his issue, whether he has an actual and vested estate tail, so that he is seised of \*the same, or he has a contingent, future, or [\*403] executory interest in tail.

And even a fine by the issue in tail, in the life-time of the ancestor, will extinguish the estate tail *quoad* the person levying the fine, and all the *descendants* ; being the issue in tail of that person.

And if the entail devolve on him, or any of his issue, the fine will bar all the issue in tail, claiming under the gift in tail, although they are collateral to the person by whom the fine was levied. *M'Williams's case*, Hob. 353. *Grant's case*, 10 Rep. 50 a. Golds. 107.

But if an heir in tail who levies a fine, die, and his descendants fail, before the entail descend on him, or on his issue, a fine levied under these circumstances will not bar any of the collateral issue.

For example : If *A* be tenant in tail, and has issue *B*, *C* and *D*, and *B* in the life-time of his father levy a fine with proclamations, this fine will bar *B*, and all his issue. It will even bar all the heirs in tail, even *C* and *D*, and their issue, provided *B*, or any of his de-

scendants inheritable under the estate tail, shall be living at the death of *A*.

But if *B* should die, and his descendants inheritable under the entail should fail in the life-time of *A*, then the fine of *B* will not have any effect as against *C* and *D*, and their issue ; for [\*404] in the latter case they are not \*either parties or privies to *B*, by whom the fine is levied.

But in the former case, since the right of entail devolved on his descendants, *B* or his issue must be named in deriving a title to the estate tail ; and this makes *C* and *D*, and their issue, privy to *B* or his issue, and brings them within the influence and operation of the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36.

Although the entail be extinguished by a fine levied under these circumstances, the estate in the lands may descend to the issue as general heirs. *Baker v. Willis*, Cro. Car. 476. But it will descend as a determinable fee ; not as an estate tail ; so that the common-law heir will take in exclusion of the special heir.

And a common recovery suffered by the heir in tail, when he has fulfilled in his person the character of heir under the entail, would bar the remainders and reversions expectant on the estate tail.

These points are extremely nice, and were considered in *Beaumont's* case, 9 Rep. 138, and were considered in *Baker v. Willis*, Cro. Car. 476.

But an estate tail thus extinguished may be revived by confirmation, or rather a new estate tail created.

And it should seem (for no decision warranting the conclusion has been found,) that if *A*, \*being tenant in tail, convey to *B* and his heirs, and *B* were to reconvey to *A* and the heirs of his body, this would be the old and not a new estate tail. It would have been otherwise if there had been a *discontinuance*.

Under less favourable circumstances the point was examined ; and Lord Chief Justice *Hobart* was of opinion there was a remitter ; and *Hulton* and *Warburton* were of a contrary opinion. See *Winch*, 5 ; 2 Lord Raymond, 780 ; *supra*, p. 388.

A fine levied by a person who has a contingent or executory interest in tail, or merely a right to an estate tail, will have the effect to extinguish the entail ; so that no interest could exist under that entail, except the fine import to be a grant for years only ; and in that case it will, during the term of years, bind the estate tail when vested, and the issue by estoppel.

Such estoppel operates, in some degree, in like manner as the common-law *estoppel*.

And such extinguishment partakes of the nature of the common-law extinguishment of rights and titles ; and is an estoppel against all persons claiming under the entail, through or under the person levying the fine.

It differs materially from a fine levied by the issue in tail, in the life-time of the ancestor. A fine so levied has merely the effect

quoad the issue, to take from the estate the inheritable \*and [\*406] other collateral qualities annexed to it as an estate tail.

It has already been observed, that deeds of mere grant pass an estate which is voidable by the issue, but not actually void, *Machel v. Clarke*, 2 Lord Raym. 778, with the exception of a covenant by a tenant in tail to stand seised to the use of *himself*, for his own life, with remainders over; or to uses, to commence after his death, *Ibid.* and *Bedingfield's case*, Cro. Eliz. 895; or a lease to commence after his death, *Lady Griffin v. Stanhope*, Cro. Jac. 455; so that the title of the issue commences before any seisin can arise under the uses, or any estate can vest under the lease. *Machel v. Clarke*, 2 Lord Raym. 778; *Bedingfield's case*, Cro. Eliz. 895.

In the excepted cases, the title of the issue will be preferred under that principle of law which avoids circuity of action, or other remedy.

It is observable also, that *the contract* of the tenant in tail, either for the sale of the lands, or to charge the same with any encumbrance, *Ross v. Ross*, 1 Ch. Cas. 171; *Herbert v. Fream*, 2 Eq. Abr. 28, pl. 34, will not be enforced specifically against his issue, though it is a contract which was binding on the tenant in tail, and would have bound the common-law heir, if the ancestor had been seised in fee-simple.

But in some cases, a decree in equity, (1 *Fonbl.* 292, note to *Bacon's Abridg. Agreements, A.*) partakes of the nature of a \*judgment; and if pronounced against tenant in tail, [\*407] will bind him and his issue, and a decree against the first tenant in tail, *upon an adverse title*, or in ordinary suits, to which the tenant in tail is a party, will bind the tenant in tail, and his issue, and all persons in reversion or remainder. *Reynoldson v. Perkin, Ambler*, 564. This is analogous to the rule of law, that a *tenant in tail may join the mise in a writ of right*. In short, in all adverse actions in the realty, he supports the rights and interests which relate to the inheritance, and defends for those in reversion or remainder, as well as for the interest of himself and of his issue.

It remains to be observed, that tenant in tail may *exchange* with tenant in fee-simple, *Machel v. Clarke*, 2 Lord Raym. 778, subject however to the right of the issue in tail to avoid the exchange.

The exchange is voidable only, and not void, as against the issue; but such exchange will be actually void against those in reversion or remainder, except it be made by some act which creates a discontinuance, or they are barred by a common recovery.

Tenant in tail, as such, has no devisable estate, nor can the estate of tenant in tail *merge* while in his tenancy; and it retains the qualities of an estate tail. *Wiscot's case*, 2 Rep. 60 b.

But in the tenancy of every other person, or even in the tenancy of the donee or heir in tail, \*after the qualities [\*408] of the estate tail are destroyed, this estate may, like all other particular estates, merge.

Though the contrary may be inferred from some books, it should

seem that tenant in tail may *quoad* himself, and *quoad* his issue, subject to the right of entry by the issue, *surrender* his estate.

The *charges* of a tenant in tail, as annuities and judgments and crown debts, are good against himself. But annuities, or judgments, or other like encumbrance, will not, by the 'rules of the common law, be binding against the issue claiming under the entail.

But by the statute 33 Hen. VIII. c. 39, sec. 75, the lands of tenant in tail are charged with payment of debts due to the king, by record or *special contract*.

And by the bankrupt laws, the commissioners may, by the means already mentioned, bar the entail.

In respect to grants by tenants in tail, and also by tenants for life, it is a rule not to construe them to operate wrongfully, when by a reasonable interpretation they may operate rightfully.

Therefore if tenant in tail, or for life, grant by deed to another, even by livery of seisin, without any words marking the duration of the estate, although in an ordinary case, 1 Inst. 43 a. the [\*409] grantee would be entitled to hold for his own \*life, yet to avoid a wrong, and because the law prefers a less estate by right to a larger estate by wrong, the grantee will be deemed tenant for the life of the tenant in tail, or of the tenant for life. In the case of a tenant for life, it is even more advantageous to have an estate for the life of the grantor than of the grantee; since, if the grant enured to the grantee for his own life, a reversion would be left in the grantor, and the estate of the grantee would be determinable, as well by his own death as by the death of the grantor, whichever of the events should first happen. *Essay on the Quantity of Estate*, chap. Life, p. 434.

The rule, *expressio facit cessare tacitum*, will of course decide the construction, when there are express words of limitation defining the quantity of estate which is granted.

#### *As to Warranties.*

WARRANTIES are distinguished into,

1, Lineal :

2, Collateral :

3, Commencing by disseisin.

Warranty commencing by disseisin may be disposed of by the observation, that a warranty so created is a *fraud*; and though *warranties are favoured, while estoppels are odious in law*, yet a warranty commencing with a disseisin, (a wrong) or annexed to an estate gained by disseisin, abatement, or intrusion, with an intent [\*410] to create \*the warranty, is of no avail to bar persons injured by the disseisin.

But though an estate be turned to a right by disseisin, yet a warranty annexed to that estate on an alienation, or on a release, or confirmation of title by any other person than him who committed the disseisin; or even by the disseisor, if the disseisin was without

an intention to create the warranty, will be free from the object of being a warranty commencing by disseisin. Litt. § 697.

And as between the parties and their heirs, the warranty is good, 1 Inst. 367 a. though it would not be of avail against those who are injured by the disseisin.

*Lineal Warranty* is when the warranty devolves, and the right descends, from the same person and on the same person; so that the party has the right as heir, and is also the heir within the scope of the warranty. The warranty may descend on the lineal or collateral heir, viz. son or nephew, who by possibility might have claimed the land as heir, from the person who made the warranty. 1 Inst. 370 a.

A collateral warranty is a warranty collateral to the title to the land, 1 Inst. 370 a; and is, when the party has a right to the land, in some other character, or under some other circumstances than those in which the warranty devolves on him; for instance, A tenant in tail discontinues, leaving B his heir, and also his issue in tail; in this instance, the warranty is lineal, because \*the [\*411] lien of the warranty, and the title, come through the same ancestor, in the same line of descent.

Thus, if an elder brother, tenant in tail, discontinue with warranty, and die, leaving his brother his general heir, and also the heir in tail, the warranty is lineal, because the right arises in the same line as the lien or obligation of the warranty descended.

But if a discontinuance be made by A, tenant in tail male, with warranty, and he die, leaving B, a daughter, or his brother, his heir, and such daughter or brother is entitled to the land under a remainder as a purchaser; or by descent from a different ancestor; in this case the warranty is collateral, because the lien of the warranty, and the title to the lands, are derived in different lines. So if a son be disseised by his father, and the father alien with warranty, and die, leaving the son his heir, this is a collateral warranty. Litt. § 704.

In short, no warranty is lineal unless the party who is the heir is to take after, and by descent, or quasi by descent, from the person who created the warranty; so that at the same time that he is heir to the land, he is heir to, that is, bound by, the warranty, and must name the person creating the warranty in making out his pedigree, Litt. § 706, and in deducing a title to the land.

Litt. § 705, gives the reason and the description of collateral warranty, in application to the \*example in § 704, of a [\*412] disseisin by a father of his son, and alienation with warranty by the father, and a descent of the warranty on the son, in these terms, "Because if no such deed with warranty had been made, the son in no manner could convey the title which he has to the tenements from his father unto him, inasmuch as his father had no estate or right in the lands;" and he concludes, "Wherefore such warranty is called collateral warranty, inasmuch as he who maketh the warranty is collateral to the title of the tenements; and this is as much as to say, as he to whom the warranty descendeth could not con-

"vey to him the title which he hath in the tenements by him that made the warranty, in case that no such warranty were made."

And a warranty may be collateral, although the blood be lineal; and the warranty may be lineal, albeit the blood be collateral. 1 Inst. 376.

Thus *Littleton* in 716, observeth,

"Also, if a man hath issue, three sons, and giveth land to the eldest son, to have and to hold to him and his heirs of his body begotten, and for default of such issue the remainder to the middle son, to him and to the heirs of his body begotten, and for default of such issue of the middle son, the remainder to the youngest son, and to the heirs of his body begotten; in this case, if the eldest discontinue the tail in fee, and bind him and his heirs to warranty, [\*413] and dieth without issue, this is a collateral warranty to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collateral to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder; because his eldest brother made no discontinuance, but died without issue of his body; and after the middle made a discontinuance, with warranty, &c. and dieth without issue, this is a collateral warranty to the youngest son. And also, in this case, if any of the said sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right, with warranty, this is a collateral warranty to that son upon whom the warranty descendeth, *Causa qua supra*."

The learning of warranty, emphatically denominated a curious and cunning learning, 1 Inst. 366 a. is collected and well arranged in *Sheppard's Touchstone*; Chief Baron *Comyns's Digest*; and *Coke on Littleton*.

It should be read first in *Comyns's Digest*; secondly, in *Sheppard's Touchstone*; thirdly, in *Coke on Litt.* ch. Warranty, with Mr. *Butler's* Annotations.

The leading points are,

1st, A warranty may be lineal as to one person, and collateral as to another person; for instance, *A* is tenant in tail, with remainder to \**B*, his brother in tail; he discontinues with warranty, and dies, leaving *C* his issue in tail, this warranty is lineal as to *C*, and collateral as to *B*. [\*414]

2dly, The same warranty may, as to the same person, be lineal as to one estate, and collateral as to another estate: as, if *A* be tenant in tail male, remainder to *B* his son, in tail general, and *A* discontinue, leaving *B* his son, his heir at law, this warranty is lineal as to *B*, in respect of his estate in tail male, and collateral as to his estate in tail general. Therefore if *B* die without issue male, leaving *C* his daughter, his issue in tail, the warranty is collateral as to *C*.

3dly, The same warranty may be lineal as to one moiety of the land, and collateral as to the other moiety.

"As, if (Litt. § 710.) the tenant in tail hath issue two daughters, and dieth, and the elder entereth into the whole, and thereof maketh



a feoffment in fee with warranty, &c. ; and after the elder daughter dieth without issue ; in this case, the younger daughter is barred as to the one moiety, and as to the other moiety she is not barred. For as to the moiety which belongeth to the younger daughter, she is barred ; because, as to this part, she cannot convey the descent by means of her elder sister ; and therefore as to this moiety this is a collateral warranty. But as to the other moiety which \*belongeth to her elder sister, the warranty is no bar to the [\*415] younger sister, because she may convey her descent as to that moiety which belongeth to her elder sister, by the same elder sister ; so as to this moiety which belongeth to the elder sister, the warranty is lineal to the younger sister."

If *A*, being tenant in tail, discontinue with warranty, leaving three children, *B*, *C* and *D*, the warranty is lineal to all the children, and will not bind the entail without assets. *C*, one of the children, releases with warranty, and dies without issue ; on his death this warranty descends. It is collateral as to *B*, if heir lineal, as to *D*, if heir. If *B*, not having assets from his father, claimed in the lifetime of *C*, there would be no impediment to his recovery, because at that time the warranty of *C* had not descended on him ; and the warranty of *A* was lineal, and there were not any assets.

If he claimed after the death of *C*, then as the collateral warranty had descended on him, the warranty would be an impediment to him, as the law would presume that he had had, or would have, assets from *A* by descent.

The like observation applies to the issue of *B* ; and if *B* die without issue, then *D* would be heir of *C* ; and as to him the warranty of *C* would be lineal, and no bar without assets. Litt. sec. 708.

4thly. A warranty may be a bar at one time, and not at another time. This point is illustrated by \*Litt. § 708 ; a [\*416] section which also proves some of the propositions formerly advanced. That section is in these terms : " Also if tenant in tail hath issue three sons, and discontinue the tail in fee, and the middle son release by his deed to the discontinuee, and bind him and his heirs to warranty, &c. ; and after the tenant in tail dieth, and the middle son dieth without issue ; now the eldest son is barred to have any recovery by writ of *formedon*, because the warranty of the middle brother is collateral to him, inasmuch as he can by no means convey to him by force of the tail any descent by the middle, and therefore this is a collateral warranty. But in this case, if the eldest son die without issue, now the youngest brother may well have a writ of *formedon in the descender*, and shall recover the same land, because the warranty of the middle is lineal to the youngest brother ; for that it might be, that by possibility the middle might be seized by force of the tail after the death of his elder brother, and then the youngest brother might convey his title of descent by the middle brother."

The material distinction at the common law between lineal and  
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collateral warranty, was, that lineal warranty was binding with assets, while collateral warranty was binding with or without assets.

But now, by the enactments of the statute of 4th and 5th [\*417] Anne, c. 16, even collateral \*warranty is not binding without assets, except in the particular case of a warranty by tenant in tail in possession, and consequently by a person who could bar the remainder by suffering a common recovery.

It is observable that a *warranty does not confer any estate* ; it does not *give any title* ; (1 Inst. 372 a.) it is merely a protection to a title ; a shield or defence as against those who are bound by the warranty, while they are bound. No positive bar to the entail is created. In the pithy language of Lord Coke (1 Inst. 372 a.) "it doth not give a right, but bindeth only a right, so long as the *"same"* [the obligation, it is apprehended] *"continueth."*

On these grounds it seems to follow, that a *title depending on warranty is not a title strictly marketable.*

Besides, if it should happen that the warranty should desoend on one person, and the right under the entail on another person, the title under the entail might, *ceteris paribus*, be enforced, since, when the action is brought, there does not exist any available defence, by force of the warranty, which can be pleaded by way of bar to the demand ; and in the nature of things it may happen that the warranty may descend on one person, and the right to the estate tail on another person ; for instance, if a person entitled under an estate tail should be attainted of felony or treason, and die, leaving issue, the blood of his issue would be corrupted,

[\*418] \*and the attainder and subsequent corruption of the inheritable blood, would, even as to lands not forfeited by the treason, interrupt the descent, and thus the issue might claim, under the estate tail, and consequently would be protected by the warranty from any bar ; so that the warranty would be extinet, although the right under the estate tail existed ; and hence, in continuation of the passage which has been cited, Lord Coke observes, "if the collateral warranty be determined, removed, or defeated, the right is revived."

It may happen from other causes, as well as corruption of blood, that the warranty, though binding for a time, may cease to operate.

It is also to be observed, that no warranty will be binding unless it be annexed to an estate which is previously discontinued, or turned to a right of action, or unless a discontinuance be effected by the operation of the warranty.

A warranty will *not bind a mere right of entry* ; consequently it will not bar a title under a term of years, or other chattel interest, 1 Inst. 389 ; since the only remedy of a termor is by entry, and ejectment which assumes an entry.

Nor will it bar a mere and naked title by force of a condition, with a clause of re-entry, or of exchange, mortmain, consent to the ravisher, or the like, nor a writ of dower, though it be an ac-

tion. 1 Inst. 389. Lord *Coke* has assigned the reason of all the examples except the case \*of dower, in these terms, [\*419] "because that for these no action doth lie ; and if no action can be brought, there can be neither voucher, writ of *warrantia carta*, nor rebutter, and they continue in such plight and essence as they were by their original creation, and by no act can be displaced or divested out of their original essence, and therefore cannot be bound by any warranty." And as to dower, the assigned reason is, "because her title of dower cannot be divested out of the original essence." 1 Inst. 389 a.

So it is of a feoffment, *causâ matrimonii prælocuti*, Ibid.: and it may be added that the like rule applies to titles by devise, and in particular by an executory devise in derogation and abridgment of a prior fee.

In one case dower was held to be barred by non-claim on a fine levied before the possession was adverse to the title of dower. *Menville's case*, 13 Rep. 19.

All these interests may be barred by non-claim on a fine with proclamations, levied after the possession is *adverse*.

### *Of Estoppels.*

EVEN at the common law estoppels are odious, while warranties, as a species of assurance, are favoured.

Estoppels do not give an estate ; they do not divest any interest ; they merely bind the \*interest by conclusion, [\*420] precluding the parties as *between themselves* from asserting or denying this state of title.

In consequence of the statute *de donis* no estoppels of a donee or heir in tail will be binding on the *succeeding heir in tail* merely as estoppels.

But the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, gave to fines with proclamations, even when they were to operate by estoppel, a far more extensive operation than even the like estoppels had at the common law against *general heirs*.\*

Subject to this statutable exception to the prejudice of the issue, there seem to flow two distinct propositions ;

1. All assurances by or from a tenant in tail, though operative only by estoppel, will have the like operation and effect, as *against him*, as they would have had against him if they had proceeded from a tenant in fee-simple ; for he himself is in the same condition since the statute *de donis*, as if that statute had not passed.

2. No estoppel by or against a tenant in tail, or an heir of entail, will have any effect as against the next successor in tail.

Between estoppel and evidence there seems to be a wide difference ; since acts which are to operate by way of evidence, are quite distinct from acts which are to operate by way of estoppel.

\*Estoppels are received as conclusive, and preclude the [\*421] investigation of the real merits of the title ; while evidence

is merely the medium of establishing facts which do exist, or have existed.

Thus, a recital of a lease for a year, as being evidence against a grantor tenant in tail, may, it is apprehended, be evidence against all persons connected with him in privity, as the issue in tail, the persons in reversion and remainder, &c. ; while an estoppel, though it would preclude the grantor being tenant in tail, would not be binding merely as an estoppel against the heirs in tail. These distinctions are examined ; and the cases which prove that conveyances which are informal, as recoveries without a tenant of the freehold, are conveyances complete and binding against the tenant in tail, and pass the estate defeasibly as against the heirs in tail, although they are not valid against or binding on these heirs, for want of a tenant to the writ of entry ; and the effect of recitals by tenants in tail is examined and discussed in the *Treatise on the Practice of Conveyancing*, 2 Vol. p. 453.

It follows that the recoveror himself cannot falsify a recovery ; so that an erroneous recovery is good till reversed, and amounts to a conveyance as between the parties, when one of them has a seisin ; and as an extinguishment by estoppel, when there is merely a right of action or of entry.

[\*422] \*And the recovery has its operation against him by estoppel and conclusion, which shall not bind the issue in tail who claim *per formam doni*. *Marquis of Winchester's case*, 3 Rep. 1.

So in *Owen v. Morgan*, cited 3 Rep. 5, the case was supposed to be the same as if the husband had had a remainder in tail expectant on an estate for life, in which case, the book continues, " A common recovery had against him shall not bind, because he was not tenant of the precipe, nor seised by force of the tail ; but the recovery as to the estate of the husband took its effect by estoppel and conclusion, and therewith agreeth 12 Edw. IV. c. 14. that against a common recovery against the ancestor in tail the issue may say that the ancestor was not tenant, *tempore brevis* : " thus, both these cases suppose the recovery to be good between the parties, and consequently they must operate as a conveyance, and the issue in tail, and those in remainder, are driven to their writ of error to avoid the recovery ; and it would be highly inconvenient that the tenant in tail should continue seised contrary to his own solemn act, or that the person to whom he conveys, and who is named tenant in the proceedings towards the recovery, should be at liberty to defend himself, and consequently retain the estate, by alleging the incapacity of the tenant in tail to suffer a recovery, which will not be binding against his issue and those in remainder ; and it cannot be supposed, that \*if the demandant acquire a seisin, either in fact or in law, he can claim to be exempt from the uses declared of his estate.

In *Bennett and others v. Vade*, 9 Mod. 314, the Chancellor treats a recovery by tenant in fee-simple as good to bind him and his heirs

by estoppel, although there is not any tenant to the precipe ; and adds, "the reason why there is no want of a tenant to the precipe in a recovery by tenant in fee, is this, that if such precipe is brought against a stranger who is not tenant, and he vouch the tenant of the lands, and he enters into warranty, by that he admits the stranger to be tenant of the lands, and so binds himself and his heirs by estoppel." He proceeds to observe, "But if he had been tenant in tail, this would not have *estopped his issue*, because he claims by a superior gift, *per formam doni*, and not through or by his ancestor : " and in the case before the court, he said, "These recoveries have revoked the will ; and Sir *John Leigh* has by them required a new estate to the purpose of revoking the will, although it be an old one." In short, the recovery had the effect of passing the inheritance to the demandant ; and for want of an express declaration of uses (for so the case appeared upon the facts) the use resulted. This resolution then is an admission, that in the case of a tenant in fee suffering a common recovery, without a good tenant to the precipe, the seisin passes to the demandant, and the uses arise on \*his own seisin, as expressly declared, [\*424] or result by operation of law.

Also, in *Duke and Smith's* case, 4 Leon. 238, it was agreed, that if he in reversion suffer a common recovery to uses, his heir cannot plead that his father had not any thing at the time of the recovery, for he is estopped to say that his father was not tenant to the precipe ; and therefore it is a good recovery against him by way of estoppel.

And in Lord *Says* and *Sale's* case, 10 Mod. 45, the language of the court is, that common recoveries, although there are no tenants to the precipes, are good, *by way of estoppel against the parties who suffer them*, though not against the remainder-man, stranger, &c.

Though the authorities are for the most part applied to the case of a tenant in fee, who suffers a common recovery, yet there is every reason to believe that tenant in tail is precisely in the same predicament, for this purpose, as tenant in fee ; with the difference only, that in the case of a tenant in fee the recovery never can be avoided ; while in the case of a tenant in tail, the recovery may be avoided by the issue in tail, or those in reversion or remainder ; but the recovery will remain in force till avoided ; and when the principles on which recoveries are founded are traced through all their circumstances ; when we follow the just conclusion, "That the recovery would certainly estop the tenant and his heirs from alleging \*any thing contrary to it ;" when we also [\*425] consider that the parties to the judgment of a court of competent jurisdiction are bound by it, and that if the seisin do not pass to the demandant, it must remain in the tenant, and that the tenant or his heirs cannot after judgment aver that he was not tenant, though he might in the first instance have pleaded non-tenure ; and that the vouchee cannot, after the recovery suffered, object that the recovery is inoperative ; so that the parties to the

judgment can never avoid it, except for error apparent on the record, and not for an *extraneous fact*, as non-tenure, &c. ; we may satisfy ourselves that the seisin which vests in the tenant is drawn out of him by the operation of the recovery, and passes to the demandant in the recovery, and supplies a seisin to the uses, and consequently confers a title to the freehold, under which the recovery, though defective against the issue, reversioner and remainderman, may be supported as a conveyance, fully operative against the tenant in tail.

If this opinion on the authorities be well founded, and it certainly is warranted by them as far as they go, there is more caution than necessity in considering a recovery without a good tenant to the writ of entry as absolutely void, instead of being voidable only ; and the practice of requiring, for the purpose of suffering [\*426] another recovery, that the person to whom \*the freehold was conveyed by the former recovery deeds should be the tenant to the new writ of entry, or join in making the tenant to that writ, is not well founded.

When this point shall be established and placed beyond doubt, either by a decision, or by the concurrent opinion of gentlemen of the most distinguished eminence, the practice of insisting on the concurrence of the former tenant, or his representative, in future conveyances, will be relieved from a considerable difficulty.

It remains to be added, that terms of years, and other like interests, which commence in interest by estoppel, are, with the exceptions already noticed, binding on all persons who by descent, by gift, or by purchase, become seised of the estate which is to feed the estoppel.

#### *As to Tenants for Life.*

UNDER this division may be ranked the estates of persons who are merely tenants for their lives, by grant or devise ; and also of persons who have estates for life, by operation of law, as tenants by the curtesy, and in dower, or from an estate tail changed by the impossibility of issue, into an estate tail after possibility of issue extinct ; also of persons who have estates for several lives, or who have estates for the life of another person, or the lives of several other persons, and who are therefore called tenants *pur autre vie*.

[\*427] \*There may also be estates for life, though they are determinable by marriage, or other like events, connected with life.

The learning on estates for life, and the modes and the terms by which they are granted or created, and the degrees of ownership conferred by different estates for life, are considered in the *Essay on the Quantity of Estates*, under the chapter Estates for Life, Curtesy, and Dower.

Of the circumstances which must concur, in order to the exist-

ence of a title by curtesy, or in dower, some further observations will be introduced in the progress of this work.

In this place it will be sufficient to observe, that tenant for life has only a particular estate. He may transfer that estate ; or he may create any underlease to be derived out of his estate. All estates he shall grant will, as far as they are derived out of his ownership, and depend for effect on his estate, without the intervention of any power, determine when his estate shall have filled the measure of its duration.

And if the estate be determinable on some collateral event, as marriage, such event, when it happens, will induce the determination of the underlease, or derivative estate.

But by a *tortious alienation*, and which necessarily amounts to a forfeiture of his estate, a subject which will be more discussed in a subsequent page, he may convey the fee by \*wrong, or tortious alienation, as by making a feoffment, [\*428] &c. He may also commit a forfeiture by such feoffment, or by levying a fine, which asserts a title to the fee, or by suffering a common recovery ; except indeed he joins with the tenant in tail in suffering the recovery ; under such circumstances, even though the estate be held under a remote remainder, the recovery will not, according to the case of *Smith and Clifford*, 2 T. Rep. 738, amount to a forfeiture of his estate ; but see *Pelham's case*, 1 Rep. 14 b. which is an authority for the contrary position, when the estate-tail is held under a remote remainder.

He may also forfeit his estate by joining the mise in a writ of right, or by accepting a fine from another, who asserts by the fine a title to the fee.

But it is easy for a tenant for life to assist a tenant in tail in suffering a recovery, without incurring the forfeiture of his estate for life.

This may be done either by the £100,000 clause, 1 Vol. of *Preston's Practice of Conveyancing*, p. 480, or by keeping a reversion, or by limiting uses, which shall give him an estate interposed between the estate of the tenant to the writ of entry, and the remainder or reversion.

An estate for life may be surrendered, or may merge ; but neither the surrender or merger will have any effect to defeat or determine any underleases granted, or charges created, by the tenant for life, prior to the \*merger or surrender. Nor will a [\*429] forfeiture by tenant for life, by tortious alienation, involve or prejudice the interests of his tenants, or those who have charges under him.

As in other instances, the estate for life must determine by force of its limitation, or must be defeated by a condition, in order to involve the interests of under tenants, in the consequences of the determination of the estate of tenant for life.

Hence Lord Coke, 1 Inst. 233 b. has drawn these distinctions :  
 " And it is to be observed, that a condition in law, by force of a statute  
 " which giveth a recovery, is in some cases more strong than a con-

“dition in law without a recovery. For if lessee for life make a lease for years, and after enter into the land and make waste, and the lessor recover in an action of waste, he shall avoid the lease made before the waste done. But if the lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for years. Nor, in any of the said cases a precedent rent granted out of the land shall be avoided. For if lessee for life grant a rent-charge, and after doth waste, and the lessor recovereth in an action of waste, he shall hold the land charged during the life of the tenant for life ; but if the rent were granted after the waste done, the lessor shall avoid it.

“And the reason wherefore the lease for years in the [\*430] “case aforesaid shall be avoided is, \*because of necessity “the action of waste must be brought against the lessee for life, which in that case must bind the lessee for years, or else by “the act of the lessee for life the lessor should be barred to recover “*locum vastatum*, which the statute giveth.

“If a man hath an office for life, which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his office, the rent-charge shall not be avoided during his life ; for regularly a man that taketh advantage of a condition in law, shall take the land with such charge as he finds it. And therefore “*Littleton* is here to be understood, that a condition in law is as strong as a condition in deed, as to avoid the estate or interest itself, but not to avoid precedent charges, but in some particular cases, as by that which hath been said appeareth.”

In investigating a title, it frequently, and particularly in the construction of wills, is necessary, to consider whether an estate for life, or estate in tail, or in fee, has been limited.

The greater part of the difficulties which occur on this subject are considered in *Preston's Essay on the Quantity of Estates*, chapters Estates, Fee, in Tail, and for Life ; and in reference to the important rule in *Shelley's case*, in *Fearne* on Contingent Remainders, and in the *Succinct view of the rule in Shelley's case* ; [\*431] a rule \*which governs so large a portion of the transactions of mankind. This rule is expressed in these terms by Mr. *Fearne*, Conting. Rem. 4th Edit. 30. “Where the ancestor takes an estate of freehold, by any gift or conveyance, and in the same gift or conveyance there is a limitation, mediate or immediate, to his heirs, or heirs of his body, the word ‘heirs’ is a word of limitation of the estate, and not of purchase.”

By Mr. Serjeant *Glynn* in *Perrin v. Blake*, MS. Reports, “In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate ; if it be limited to the heirs of the body, he takes a fee-tail ; if to his heirs, a fee-simple.”

And by Lord *Coke*, 1 Inst. 376 b. in these terms ; “Whensoever



the ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heirs, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder." Litt. § 719.

If any further information be wanted on the subject of this rule, or the case is to be governed by any particular decision, recourse must be had to the Abridgments and Digests, under the title *Devises, Remainders, Estates*; and to the Reports, and the Indexes to the Reports.

Also, it is frequently important to consider whether an estate for life is determined; whether it was duly surrendered; or whether it has been determined by merger. In many cases it will also be important to ascertain, that the estate \*for life was [\*432] so defeated, surrendered, merged, or determined before a given time.

This is more particularly important when the question arises, whether an ancestor was actually seised, so as to become the stock of a new succession; whether a contingent remainder has been defeated by the destruction or determination of the particular estate, before the remainder could commence in possession; or whether a recovery was duly suffered, and consequently the freehold was in the person against whom the writ of entry was brought; also, whether an estate in remainder has become an estate in possession, so as to warrant the exercise of certain powers given to tenants for life, when in possession, &c. or to confer a title by dower or by curtesy.

These points should be very attentively considered, as often as they may have any influence on the title.

In many instances also, it is essential to the title to consider and decide whether trustees have merely an estate for life, or an estate in fee. This point arose in the cases of *Bagshaw v. Spencer*, 2 Atk. 246; *Smith v. Skapland*, 1 Bro. Ch. Cas. 75; *Venables v. Morris*, 7 Term Rep. 342; *Doe d. Compere v. Hicks*, 7 Term Rep. 438; *Curtis v. Price*, 12 Ves. 89; and was much discussed in the late case of *Wykham v. Wykham*, 11 East, 458; 3 Taunt. 316; 8 Ves. 395; *Jones v. Saye and Sele*, 3 Br. Ch. Cas. 458.

When trustees have the fee, all the subsequent limitations will be mere trusts, and a \*common recovery duly [\*433] suffered will be good in equity, without the concurrence of the trustees; but when the trustees have the legal estate of freehold for the life of A or of B, and the remainders are of the legal estate, it is impossible to suffer a valid recovery to bar the estate tail and remainders without the concurrence of the trustee as having the freehold; 1 Vol. of the *Practice of Conveyancing*, 24. 166.

In some cases also, a question arises, whether the trustee who has the freehold can, without the direction of a court of equity, assist the first tenant in tail of the legal estate, in suffering a recovery.

It is agreed that such recovery will be good at law.

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The only doubt is, whether a court of equity would restrain its operation by treating the concurrence as a breach of trust ; *Moody v. Walter*, 16 Ves. 288 ; and the parties as in the same condition as if no recovery had been suffered.

Estates for the life of the tenant himself will necessarily determine with his death, and of course no right by succession arise from his tenancy ; but estates for several lives, or even for the life of a stranger, or an estate to a man for his own life, which becomes vested in another as his assignee ; in other words, estates *pur autre vie*, may devolve from the tenant to certain persons as his successors.

This was formerly considered as a title in some cases by [\*434] special, and in other cases by \*general occupancy, a subject well illustrated by *Blackstone* in his Commentaries, 2 Vol. chap. 16.

The title by general occupancy has ceased ; and the estate will belong to the heirs, or heirs of the body of the tenant, if they be named as special occupants, otherwise to the executors or administrators ; as substituted in the place of general occupants. On this subject see *Essay on the Quantity of Estates*, chap. Estates for Life.

Such estates, when transmissible to heirs generally, are now devisable by a will attested by three witnesses ; and when the lands are devised, the devisee will take, as, or in the nature of, an occupant.

It is clear that if the lands are descendible to the heirs, the right of the heir cannot be defeated by a will, unless such will be attested by three witnesses.

The statute had also been applied in practice by some gentlemen, to devises of lands in which the executors, &c. took as executors for want of a special occupant.

It has always been the opinion of the writer of these observations, that though the executor might have a legal title against a devisee, for want of an attestation of the will by three witnesses, yet the executor, taking as such, must be bound in equity at least, by

all the dispositions of the testator's will, and consequently [\*435] the legatee will have the benefit of the \*disposition in his favour in equity, if not at law ; and it should seem in equity only ; for it would be strange that the freehold should be changed by mere assent without a conveyance.

It is now decided by *Ripley v. Waterworth*, 7 Ves. 425, that the executor is a trustee for the legatee, although the will be not attested by three witnesses.

An opinion also has been sometimes given that when a feme executrix has an estate *pur autre vie*, in her character of executrix, the estate may be aliened by her and her husband without a fine.

This opinion is questionable at least ; and it is not by any means safe to act on it. The better conclusion is, that no alteration is made by the statute law in the mode of alienation : and a confident opinion is entertained, that there cannot be any alienation binding on the wife without a fine, or other assurance of record.

The rules and principles of tenure require that there should be a fine, &c. An estate of freehold cannot pass from a married woman without a fine, or some other assurance by record. 1 Scholes and Lafroy, 290.

So copyholds for life in trustees for a woman are frequently considered as her personal estate; and it is contended, that she and her husband, and the argument must go the length, that the husband alone, may alien these copyholds by deed. But it should seem that unless there \*be an express trust, con- [\*436] verting the realty into personalty, a married woman has an interest in the copyhold itself by way of realty, which cannot be barred or aliened by the act of her husband, or of the husband and wife, except in the same mode in which they might have transferred a legal estate in the same tenement.

In all cases of alienation of life estates, simply and alone, the fine *sur concessit* is proper to be adopted, and it should be a fine for the life or lives.

A fine which imported to pass the fee; and even a fine *sur concessit*, amounting to a grant in fee, would be a forfeiture if the parties had the legal estate; no alienation, by the equitable owners, will be a forfeiture of an equitable estate.

Estates for a life or lives, though limited to *heirs of the body*, are mere estates of freehold, and not of inheritance.

Therefore no dower or curtesy can arise from the seisin of an estate of this description. *Grey v. Manock*, cited 6 Term Rep. 292; *Blake v. Blake*, in the Exchequer, 1786.

Nor is an estate tail created. There is merely an estate in the nature of an estate tail; a *quasi entail*. *Low v. Burron*, 3 P. Will. 262; *Grey v. Manock*, 6 Term Rep. 292.

This *quasi entail* is not within the protection of the statute *de donis*. Per Lord Northington in *Grey v. Manock*, *ibid*.

\*As a *quasi entail* may be created, so remainders after [\*437] or expectant on a *quasi* estate tail may be limited. For this species of estate admits of limitations by way of strict settlement; as to one for life, remainder to another, as *quasi* tenant in tail, with limitations over.

Unless there be an alienation by the *quasi* tenant in tail, there will be a devolution, or *quasi* descent, to his heirs, heirs of the body, or heirs male, or heirs female of the body, according to the form of the gift.

And on failure of special heirs, when the gift is to them, the limitations over may have effect in like manner, as in the regular order and course of remainders, after an actual estate tail. See Fearne's Executory Devises, 386; *Low v. Burron*, 3 P. Will. 362; *Doe v. Luxton*, 6 Term Rep. 293; Cooper, 178.

The persons entitled under the limitations over, take by way of remainder, as special occupants, as answering a description of who should take as special occupants during the continuance of the

lease for a life or lives, or the copyhold grant for a life or lives; for the doctrine extends to copyholds for lives.

As an estate for lives cannot transgress the rule against perpetuities, no limitation of an estate for lives can be too remote and void on that account. *King v. Cotton*, 2 P. Wil. 608; *Low v. Burron*, 3 P. Wil. 262.

[\*438] In *Mogg v. Mogg*, 1 Merivale, 654, the Court \*of King's Bench considered this point to be so clear that it did not admit of argument.

1st, It is clear that a person who has an estate as *quasi* tenant for life, (*Dillon v. Dillon*, 1 Ball and Beatty, 77; *Low v. Burron*, 3 P. Wil. 262.) or even a donee of a contingent interest by way of entail, cannot bar the limitations over. The former may convey his own estate; and the latter may make a release, binding as against himself and his issue.

2dly, If there be a limitation to one and his heirs, and not to the heirs of his body, with a limitation over by way of executory devise, or shifting use, this limitation over cannot, it should seem, be barred by the first taker.

The donee of this estate, or owner for the time being, and being *quasi* tenant in tail of a *vested* estate, may in any case, and under any circumstances, whether he be tenant in possession, reversion or remainder, convey so as to disappoint his issue the *quasi* heirs in tail.

He may surrender the lease (*Low v. Burron*, 3 P. Wil. 362; *Baker v. Bayley*, 2 Vern. 225; *Doe v. Luxton*, or *Blake v. Blake*, Cox's Rep. 266; Cooper, 178; 6 Term Rep. 293.) convey by lease and release, or other proper mode of grant, or by fine *sur concessit*; but a fine is necessary only on account of coverture; (per Lord Kenyon, 6 Term Rep. 299;) and it has not any other effect than an act *inter vivos* (per Lord Hardwicke); or he may [\*439] bind the \*issue by contract to sell, or article to settle; (*Wasteney's v. Chappell*, 1 Bro. Parl. Cas. 457,) or it should seem by will.

At first it was supposed that these limitations over by way of remainder could not be barred; *Low v. Burron*, 3 P. Wil. 362; but in *Duke of Grafton v. Hammer*, 3 P. Wil. 263, it was decided that the *quasi* remainders may be barred by the person who was the *quasi* tenant in tail in possession, though the legal estate was in trustees, and though the *quasi* tenant in tail was a *feme covert*; the alienation having been by her and her husband by fine *sur concessum*. And in *Doe v. Luxton*, 6 Term Rep. 299, Lord Kenyon observed, "I am rather inclined to think that the first taker may bar the remainders over by his will alone. He may certainly do so by any conveyance in his life-time, by livery of seisin, covenant to stand seised to uses, bargain and sale, &c.

It was in equity, and on account of the doctrine of tenant right attaching on leases obtained under renewals, that the power of barring the limitations over was allowed to the *quasi* tenant in tail.

This right of alienation is sometimes supposed to exist in analogy to the right of alienation under gifts of conditional fees.

But the analogy fails, inasmuch as the right of alienation does not in any manner depend on the birth of issue.

\*Thus it is clear that these limitations over may be barred [\*440] by the alienation of *quasi* tenant in tail, when he has the *quasi* estate tail as the first or immediate estate; or he has the concurrence of the tenant of the prior life estate, *Forster v. Forster*, 2 Atk. 259; though such prior life interest be clothed with a trust; *Orbrey v. Bury*, 1 Ball and Beatty, 53; and he may bar by surrender or conveyance, (Lord Kenyon in *Doe v. Luxton*, 6 Term Rep. 292;) and it should seem they may be bound by articles or contract, and even by will.

Some of these propositions rest on opinion, and not on decision.

In particular the effect of a will is doubtful.

Lord Kenyon was, as already stated, of opinion, that a will was sufficient; while in *Dillon v. Dillon*, 1 Ball and Beatty, 77, Lord Mannors ruled, that the will of a *quasi* tenant in tail, who died without issue, did not bar the limitations over; and Lord Redesdale, in *Campbell v. Sandys*, 1 Scholes and Lefroy, 295, questioned the power of alienation by will.

And though the *quasi* tenant in tail may bar his heirs or issue, even when he has an estate in remainder, or reversion expectant on the estate of a prior tenant for life, yet it is not decided that he can, unless he be the first taker, or a *quasi* tenant in tail in possession, or obtain the concurrence of the owner of the prior life interest, bar the limitation over by \*way of remainder or re- [\*441] version. A trust by way of chattel interest is not an impediment; *Blake v. Luxton*, Cooper, 178.

The judicial opinions, however, are in favour of his power of alienation by deed, &c. to the exclusion of those in remainder, &c. *Doe v. Luxton*, 6 Term. Rep. 292.

But if the author of this *quasi entail* should retain the reversion of an estate for lives, by creating a partial interest; by grant of that interest only; as in the case of a gift by a tenant for life to another, and the heirs of his body without any further disposition; it is, on principle, questionable whether this reversion could be defeated by the *quasi* tenant in tail.

On principle, it should seem that his interest could not be affected by any act of his under tenant; for that is the situation in which this tenant of the *quasi* entail would stand. The equitable *quasi* tenant in tail has the like power of alienation as the *quasi* tenant in tail of a legal estate. *Blake v. Blake*, Excheq. 1786; 3 Cox's P. Wms. 10, n. 1; and 1 Cox's Rep. 266; Cooper, 178.

Limitations of freehold leases, &c. are by analogy within the influence of the rule in *Shelley's* case. *Ex parte Sterne*, 6 Ves. 156; *Forster v. Forster*, 2 Atk. 256; and *Dillon v. Dillon*, 1 Ball and Beatty, 77.

And limitations, which in reference to an estate of inheritance.

[\*442] would create an estate \*tail, would give a corresponding interest in a freehold or copyhold for lives, so as to confer a corresponding power of alienation, *ibid*.

But all the interest held under a freehold lease for lives may pass without any words of gift to the *heirs*; *Windham v. Jekyl*, 2 Ves. sen. 681; and therefore, no words of limitation are of absolute necessity in the transfer of an estate under a lease for lives.

And it should seem that contingent remainders of a legal estate under a lease for lives, are, like other contingent remainders, liable to destruction.

For all the purposes of tenure, and alienation, and the right of voting at elections for knights of the shire, leases for lives at reserved rents, are considered as leases conferring a title to the freehold; and by the common law no recovery could be suffered of a particular farm so in lease, without the concurrence of the person in whom the freehold was vested under the lease.

But in this particular the common law is altered by the statute of 14 Geo. II. c. 20.

Even at the common law, in the case of a *manor*, and a lease of part of the demesnes of the manor for lives, a recovery suffered of the manor would have been good, so as to bar the estate tail in the demesnes, as well as the other parts of the manor, notwithstanding the demesnes were in lease, and the lessee, or [\*443] the \*person having his estate, did not join in making a tenant to the writ of entry. *Johnson v. Earl of Derby*, Pigot on Recoveries, 201.

This case depends on its particular circumstances. The manor is an entire thing consisting of the demesnes and services. The reversion expectant on the lease remained parcel of the manor, and passed inclusively, by the recovery suffered of the manor.

The statute in question, after reciting that several leases had been theretofore, and were thereafter, likely to be made of honors, castles, manors, lands, tenements, and hereditaments, for one or more life or lives, under *particular rents* thereby reserved and to be reserved; and that procuring surrenders of such freehold leases, or the tenants thereof to join in order to make tenants to the writs of entry or other writs, for suffering common recoveries, frequently occasioned great trouble, difficulty and expense to tenants in tail; and the same could not, in many cases, be obtained by reason of the uncertainty in whom the legal estate of freehold under such leases were vested; and also by reason of the disabilities and incapacities of such lessees, or persons claiming under them, by means whereof purchasers and family settlements were often delayed, and might be in great danger of being defeated, if some proper remedy were not provided.

[\*444] The act enacts, for remedy thereof, "That all \*common recoveries, suffered or to be suffered in his Majesty's court of Common Pleas at Westminster, or in any other court of Record, in the Principality of Wales, or in any of the counties palatine, or in

any other court having jurisdiction of the same, of any honors, castles, manors, lands, tenements, or hereditaments, without any surrender or surrenders of such lease or leases, or without the concurrence, or any conveyance or assurance, from such lessee or lessees, or other person or persons, claiming under such lessee or lessees, in order to make good tenants to the writs of entry or other writs, whereupon such recoveries had been or should be had or suffered, should be as valid and effectual in law, to all intents and purposes whatsoever, as if such lessee or lessees, or any other person or persons claiming under him, her, or them, had conveyed, or joined in conveying, or should convey, or join in conveying, a good estate of freehold to such person or persons as had been or should become tenant or tenants to such writs of entry or other writs, whereupon such common recoveries had been or should be suffered."

And it is provided, that nothing in that act contained should extend or be construed to extend to make any common recoveries valid and effectual in law, unless the person or persons entitled to the first estate for life, or other greater estate (in case there be no such estate \*for life in being) in reversion or re- [\*445] mainder next after the expiration of such leases, had by some lawful act or means, conveyed or assured, or joined in conveying or assuring, or should by some lawful act or means convey or assure, or join in conveying or assuring, an estate for life, at the least, to such person or persons as had been or should become tenant or tenants to the writs of entry, or other writs, whereupon such common recoveries had been or should be suffered.

Sometimes, to support a title under a common recovery, it is necessary to consider whether a *surrender* by tenant for life may not be *presumed*.

Such presumption must be grounded on some fact, as possession in the person having the remainder or reversion, &c. and enjoyment without any claim, &c. 1 vol. of *Practice of Conveyancing*, 81; for if the possession can be explained as held under a defective deed, the possession is accounted for, and the presumption rebutted.

Particular circumstances may justify a jury to form the presumption, and draw the conclusion, that a surrender has been made.

But a conveyancer, in advising on a title on behalf of a purchaser or mortgagee, cannot, except in very particular circumstances, such as possession for sixty or seventy years under the recovery, safely presume that a surrender was made.

\*Care must be taken in all cases which concern the [\*446] operation of recoveries, titles by curtesy, dower, &c. descents, &c. not to confound estates for life with estates for years determinable on a life.

Estates of the former description are of freehold interest. Those of the latter description are strictly leasehold, and chattel-

real property. *Dormer v. Parkhurst*, 3 Atk. 135; *Willes's Rep.* 327.

Estates for life may be encumbered by judgment, in like manner as estates in fee-simple, with the difference only which arises from the extent and duration of the several estates.

Uses may also be declared on an assignment of lands, or other real property held for a life or lives.

Annuities by way of rent-charge are frequently granted to a person and his *heirs* for a life or lives, instead of being granted for years, determinable with the decease of a person, or the decease of the survivor of several persons.

When such annuity is derived out of, and depends on a *freehold interest*, the annuity will, on intestacy, be transmissible, and belong to *heirs*, and not to *executors* or administrators: at least such is the opinion, entertained on mature deliberation. But every annuity granted out of a chattel interest will be a *chattel interest*, although it be limited to the grantee and his heirs for a *life or lives*.

[\*447] \*An interest which in its nature is a chattel real cannot be rendered transmissible to heirs. Litt. § 740.

An estate in *special tail* may resolve itself, by failure of the issue inheritable to the entail into an estate, which, in point of duration, will be merely for life. This estate is termed an *estate tail*, after *possibility of issue extinct*.

For all the purposes of alienation, title, and forfeiture, it is merely an estate for life. There are qualities which it retains, of an estate of inheritance; 1 Inst. 27 b: and a common recovery duly suffered before the failure of issue, would enlarge the estate into a fee-simple; and the estate thus enlarged, and its qualities altered, would not be abridged in consequence of a subsequent failure of issue.

As connected with estates for life, it may be observed, that women seized in special tail *ex provisione viri*, are, for some purposes, considered, with reference to their power of alienation, as tenants for life. They cannot bar the entail without the concurrence of the issue, or the person in reversion or remainder.

This subject is examined in the first volume of the *Practice of Conveyancing*, p. 20.

The restraint is confined to those cases in which the gift is by the husband, or some of his ancestors; or is by the provision of the husband, or his ancestors.

It does not extend to those cases in which the entail is [\*448] created by the wife, or any of her \*ancestors, or is given to her by any stranger; nor to any case in which the wife has a general estate tail, and the remainder is limited to a stranger.

In *Foster v. Pitfal*, Cro. Eliz. 2, the wife had an estate in tail general, *ex provisione viri*, with remainder to a stranger in fee; and it was determined that this case was not within the statute. The



case seems to have turned on the grounds that the remainder was limited to a stranger, and that the entail was general.

And if husband and wife be *joint-tenants* in fee, and create an estate tail, so as to bring the case within the statute, this entail will, as to one moiety (since each had the power of settling his or her moiety,) be considered as *ex provisione viri*, but as to the other moiety, it will not.

In the same case, on a question, whether an estate in fee was within the statute of 11 Hen. VII. c. 20, it was held by all the judges that it was not; and even a woman seised in special tail may alien jointly with her husband the donor, or with the consent of the next heir in tail; or if none, the person next in reversion or remainder. Such consent of the issue in tail, or person next in reversion or remainder, must appear on record, or be enrolled; and consequently they ought to be parties to the fine or recovery by which the entail is barred, or to a deed enrolled.

The language of the statute is, "Provided \*also, that [\*449] "this act extend not to any such recovery or discontinu-  
"ance to be had, where the heirs next inheritable to the said wo-  
"man, or he or they that next after the death of the same woman,  
"should have estates of inheritance in the same manors, &c. be  
"assenting or agreeable to the said recoveries, where the same  
"assent or agreement is of record or enrolled."

*Tenant in Tail after Possibility of Issue extinct.*

FOR all the purposes of alienation tenant in tail, after possibility of issue extinct, is considered only as tenant for life.

In *Lynch v. Spencer*, Cro. Eliz. 513, the tenant in tail, whose issue had in her life-time levied a fine with proclamations, and thus taken from the estate tail its descendible qualities, was, by some unaccountable mistake, considered as tenant, after possibility of issue extinct.

But in a case of this description, the tenant in tail retains the right of alienating the fee-simple by common recovery. See *Beaumont's* case, 9 Rep. 138; and *Baker and Willis*, Cro. Car. 476. And on the principle established by Mr. *Fearne's* opinion, in his posthumous works, p. 442, it should seem that a common recovery suffered by the heir in tail, after the death of the ancestor, would bar any reversions or remainders expectant on the estate tail.

\*In *Sir George Brown's* case, 3 Rep. 50, the wife was [\*450] tenant in tail, *ex provisione viri*. The heir in tail having also the reversion in fee, levied a fine with proclamations, and the wife afterwards aliened so as to commit a forfeiture under the statute of 11 Hen. VII. c. 20; and it was held, that the right of entry for the forfeiture was in the *reversioner*; the conusee of the fine levied by the issue in tail by virtue of the reversion, and not of the entail; for it was admitted that the estate tail was barred by the fine, and

that the issue, being by his fine disabled to enter, the right of entry devolved on the person having the reversion under the heir in tail, in right of his reversion.

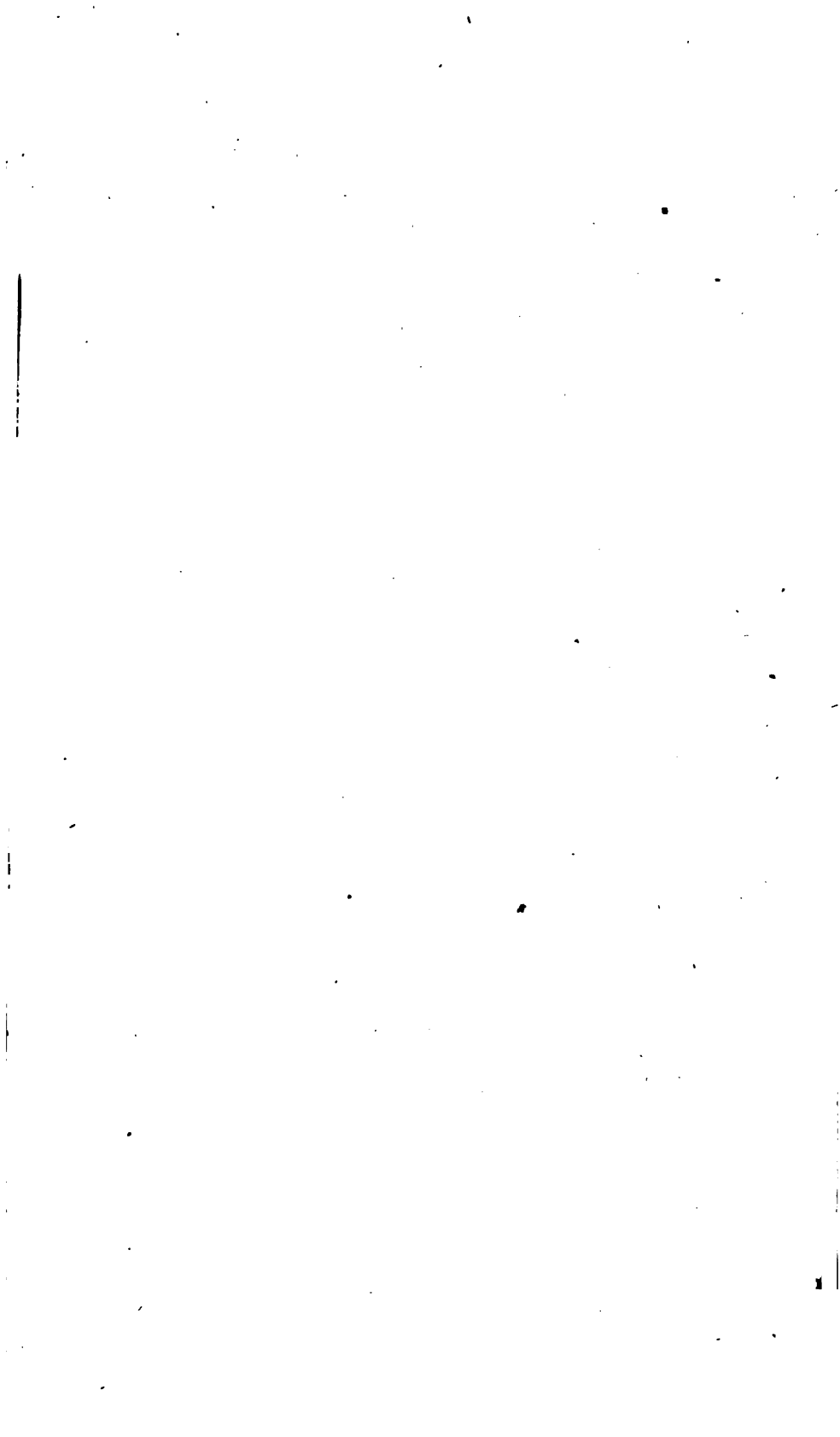
Tenants in tail of the gift of the crown, for services performed, are, in respect of their power of alienation, while the reversion is retained by the crown, on the same footing with tenants for life, except that they do not forfeit by claiming the fee, &c.

The reversion of the crown puts it beyond their power to divest the remainder or reversion, or the estate tail.

So under several acts of parliament, for instance, the acts rewarding the Duke of *Marlborough*, the Duke of *Wellington*, Lord *Chatham*; and also under settlements made by acts of parliament of the estates of some noble families; the tenants in tail are, for the purposes of ownership, in the same condition with tenants for [\*451] life, \*except so far as they may by force of the acts have powers of leasing and of jointuring.

And they are, in equity, when they pay off encumbrances treated as tenants for life, namely as presumable encumbrancers, in the place of those creditors whose encumbrances they have discharged, *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. jun. 227.

The points on alienation by tenant for life, which are collected in a former part of this work, should be reconsidered in this place.





**AN ESSAY**  
**IN A COURSE OF LECTURES**  
**ON**  
**ABSTRACTS OF TITLE;**  
**TO FACILITATE THE STUDY,**  
**AND THE APPLICATION**  
**OF THE FIRST PRINCIPLES,**  
**AND**  
**GENERAL RULES**  
**OF THE**  
**LAWS OF PROPERTY;**  
**STATING IN DETAIL,**  
**THE DUTY OF SOLICITORS IN PREPARING, &c. AND OF COUNSEL IN**  
**ADVISING, ON ABSTRACTS OF TITLE.**

By **RICHARD PRESTON, Esq.**

**BARRISTER AT LAW.**

**VOL. II.**

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**O. HALSTED, NEW-YORK,**  
**WM. ABDALLAH HALSTED, PHILADELPHIA,**  
**LAW BOOKSELLERS.**

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**1828.**



TO

THE RIGHT HONOURABLE

**SIR THOMAS PLUMER,**

MASTER OF THE ROLLS,

THIS VOLUME IS INSCRIBED,

*BY THE AUTHOR,*

AS A TRIBUTE OF SINCERE RESPECT AND ESTEEM.





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\* Read in the text, 'except by a lease' or 'gift.'

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ON  
**THE LAWS OF PROPERTY**

AS APPLICABLE TO

**ABSTRACTS OF TITLE.**

ON TITLES.

*Under Tenants for Years.*

THESE Tenants may assign their terms, or make under-leases, or encumber the land with rent-charges, or any like charges. Such rents must necessarily be *chattel interests*, though limited for the lives of the grantees.

And therefore if lessee for years grant to another a rent out of the land, for the life of the grantee, this is a good grant during the term, if the grantee should so long live ; for this grant shall be taken strong against the grantor, and shall not be void, when, by any construction, it may be good (a).

\*So if lessee for years grant land to another for the term of [\*2] *his life*, the grantee hath the whole term ; but with this collateral determination, if the grantee live so long (b) ; and the construction is in this respect the same on a deed as on a will (c).

And a rent-charge for life as a freehold interest cannot, in point of estate, exist by force of a title under a term of years (d).

And the same rent cannot be a *freehold* interest as to some lands, and a chattel interest as to other lands (e) ; or, as Lord Coke expresses it, "*One entire rent cannot be a freehold out of black acre, &c. and a chattel out of white acre.*"

But a rent may be a freehold interest, as a charge issuing out of freehold lands, and at the same time confer a charge, by way of distress, on lands held for years (f).

The better opinion is, that a *judgment* is not a lien on the term itself ; but that the term is bound only from the time at which the writ of execution is delivered into the sheriff's office (g) ; but an equity of redemption of a term is not bound by execution (h). Mr.

(a) *Butt's case*, 7 Rep. 23. (b) 7 Rep. 23. (c) *Ibid.* (d) *Ibid.* (e) *Ibid.*  
(f) 7 Rep. 23 b ; 1 Inst. 147 b. (g) *Burden v. Kennedy*, 3 Atk. 379 ; 29 Car. 2. c. 3.  
(h) 3 Atk. 579 ; *Lyster v. Dolland*, 1 Ves. jun. 431.

Serjeant *Hill* gave an opinion, that the creditor had a right to [\*3] sue an elegit, and that on an extent, \*the title of the judgment creditor would (as in the case of freehold lands) have relation to the time when the judgment was docketed. This opinion has not been followed in practice.

A sale of a term by the king's debtor, before the term is extended, is good against the crown, unless the sale can be impeached for fraud (i).

But if there be merely a right of entry, the term cannot be assigned till the estate has been revested by entry (k.)

For it is an ancient maxim of the common law, that a right of action, or chose in action, cannot be granted or transferred to a stranger (l); and thereby, as Lord *Coke* observes, "is avoided great oppression, injury, and injustice (m)."

Whether the term be actually vested, or be limited by way of *interesse termini*, it is assignable (n). But a person who has a contingent interest under a term cannot, it should seem, (*sed quære*,) assign the same at law; nor is a term held under a legal title, and limited by way of executory bequest, assignable at law, so far as it is placed in an executory state (o). Contingent interests [\*4] under terms and executory \*interests, and terms reduced to the condition of a right of entry, may be released (p).

And assignments of terms under a title, depending on a contingent or executory interest, will, when they are made for a valuable consideration, be supported in equity.

When a term is bequeathed to *A* during his life, and after his death, to *B*, the interest of *B* during the life of *A* is executory.

In point of law, the whole term is in *A*, determinable by his death; and if *B* release to *A*, *A* will have the term absolutely; and if *A* assign to *B*, *B* will have all the term absolutely (q).

And if *A* and *B* join in an assignment to a purchaser, the assurance will amount to an assignment of the term by *A*, and to a release of the possibility by *B*.

Had the term been for one hundred years, and the gift been to *A* for fifty years, if *A* or if *B* should so long live; and after the determination of that estate, then to *C* for the residue of the term; then each donee, whether the gift was by deed or will, would have a legal estate (qq).

In this instance, the estate of *B* is measured, and is a new term; while in the other instance it could not be ascertained how many of the years, as distinguished from the residue of the term, were to belong to *A*.

[\*5] \*And in a deed of grant, except so far as it is by way of trust, a limitation over cannot be made after a term of years,

(i) Sir Gerard Fleetwood, 8 Rep. 171.

(k) *Stevens v. Hankam*, 3 Lev. 512; 4 Mod. 48.

(l) 1 Inst. 266 a.

(m) Ibid.

(n) 1 Inst. 46; Perk. § 91.

(o) *Lampel's case*, 10 Rep. 46; *Manning's case*, 8 Rep. 94.

(p) *Lampel's case*, 10 Rep. 46; *Manning's case*, 8 Rep. 94. (q) Ibid.

(qq) *Flowd.* 534.

or other chattel interest, has been granted to *A* for his life, or for the life of *B*.

An executory interest in chattels real, is also *transmissible* to executors or administrators, and may be bequeathed. It may also pass by the bargain and sale of commissioners of bankrupt.

It is frequently important to consider whether the assurance of a tenant for years amounts to an *assignment*, or is only an *under-lease*.

The mere reservation of rent will not, as was once supposed, cause the assurance to be considered as an under-lease. Every deed which passes all the time or estate of the termor, either in all or in a part of the lands, will amount to an assignment of the lands which are comprised in the assurance (r).

And a grant for a less portion of time than the whole term, either by excepting the last day of the term, or by limiting a term which may, or necessarily must, determine before the end of the original term, will be an underlease (s).

From the case of *Jermyn v. Orchard* (*Showers's* Parliament Cases) (ss), and from the language of some of the other Reports in which that case is to be found, it might be inferred that an *assignment* must necessarily pass all the interest of the [\*6] termor; so that an assignment to commence *from a future day*, or on an event, would be void.

On principle, it would be perfectly correct that no assignment should be good unless it created an immediate tenancy; in other words, privity between the assignee and the reversioner or remainder-man. But *Jermyn v. Orchard* is not to be relied on as an authority, that an assignment is void, merely because it is to commence in interest from a future day, or upon an event.

There are cases (t) which admit that a grant of lands held for a term, to commence from a future day, or upon an event, is good; as, if lessee for years grant to *A*, that if *I S* die, *A* shall have his term, this is a good grant; and yet the term is to pass on a contingency, and the grant is suspended in operation in respect of vesting the estate, until the contingency arise. So if one grant to another, that if he can obtain the good will of the lessor, he shall have the grantor's term, then if he perform the condition he shall have the term, otherwise not.

And though, by the words of the *habendum*, the term may be limited from a future day, yet if the assignment contain a grant of all the estates, &c. these words will pass all the time of *the* [\*7] term, and the *habendum* will be deemed repugnant, and rejected (u).

But when the clause or grant is carried on with a connection, so as to grant the term *in futuro*, or at least after the death of a person, as, if lessee grant his term after his death, the grant has been deemed void.

(r) 2d vol. *Preston's Practices of Conveyancing*, p. 124.

(s) *Flow. Com.* 524.

(ss) *Ibid.*

(ss) 189.

(u) *Jermyn v. Orchard*, *Show. Parl. Cases*, 207.

The technical reason of the invalidity of a term, assigned to commence after the death of *A*, may be the legal notion, that the life is of longer presumable continuance than the term. It is difficult on any other ground, or even on that ground, to reconcile the authorities.

It is quite clear that every tenant, except a tenant in tail, and even a tenant in tail as against himself and his general heirs, or of a chattel interest, may create a term of years to commence even after his own death (*uu*).

The material distinction between an assignment and an under-lease, is, that an under-lease leaves a reversion in the termor. It must be the ultimate part of the term, so that the only privity may be between the termor and his lessee.

For this reason the original lessor or his assignee cannot maintain any action upon covenants; or bring any action of debt, founded on the privity of estate, against the under lessee, or any person claiming under him.

Another consequence is, that the under-lessee cannot surrender to the original lessor. He must surrender to his immediate [\*8] lessor (the \*termor,) or his assignee. Nor is such under-lessee capable of a release by way of enlargement from the original lessor (*v*).

Sometimes also a question arises whether the instrument amounts to a lease, or is merely a contract for a lease. The leading authorities on this point are Shep. Touch. 270; *Bagster v. Brown* (*w*); *Goodtitle* dem. *Estwick v. Way* (*x*); *Doe* dem. *Coore v. Clare*, Lady *Montague's* case (*y*).

The distinctions afforded by these cases will be drawn in the fourth volume of the *Practice of Conveyancing*, in the chapter on assignments of terms of years.

In considering titles depending on leases or other assurances, either for lives or years, several points are to receive attention.

### 1st, *As to the Title of the Lessor.*

When leases are granted by corporations, ecclesiastical persons, &c. it is neither the practice, nor does it seem necessary, to require any evidence of the title of the lessor.

Whether in other and ordinary cases a purchaser had a right to require the seller to produce evidence of the title of the lessor, was, for a long period, a point on which a great diversity of opinion was entertained by the profession (*z*).

[\*9] \*The present practice, and the authorities, lean towards requiring evidence of the title of the lessor; and it was always agreed, that when the lease was made under a power, either in an act of parliament, or in a private conveyance, the title, as far

(uu) Plow. 524.

(v) 2d vol. *Preston's Practice of Conveyancing*, p. 352.

(w) 2 W. Black. Rep. 973.

(x) 1 Term Rep. 752; 2 term Rep. 739.

(y) Cro. Jam. 301; Bulstr. 190.

(z) 1 Vol. p. 13.



as it was connected with the power, must be stated. Even a person who contracts for a lease has a right to the inspection of the title of the intended lessor (a).

2dly, *The Duration of Interest, &c.*

Care must also be taken to see that there exists under the lease that duration of interest which is professed to be granted; and that this interest is, in point of title, or collateral determination, determinable by those means only, or at that time only, which is stipulated between the parties.

3dly, *The Rent, &c.*

Care should also be taken that the rent is only of that amount which is stated in the contract, since an increase of rent would diminish the value of the purchase.

4thly, *The Tenant-Right, &c.*

Also, that there is not any existing tenant-right which can affect the title with a trust.

On this subject, Mr. *Butler's* notes on trusts \*arising from [\*10] tenant-right, and the case of *Lee v. Vernon* (aa), and the arguments of that case, will be read with particular advantage and great satisfaction. The late case of *Nesbitt v. Tredennick*, in Ireland (b), is in unison with the general tendency of the decisions in England. It proceeds on the ground, that, as the leasehold interest was forfeited absolutely to the mortgagee, so was the benefit under the renewed lease. And in this place it is to be observed, that a lease in consideration of a surrender of a former lease, is implied notice of the lease, and leads the purchaser to an investigation of the intermediate title, and consequently the examination of all prior leases and mesne assignments (c).

In such instances therefore it is obvious that the evidence of the title should be traced for a considerable period; and in some cases, and such is the practice, even for sixty years or more, so as to show that there is a good title in equity as well as at law.

5thly, *The Surrender, &c.*

Also in titles depending on leases by ecclesiastical persons, &c. it is essential that the old lease should be surrendered, &c. before the new lease is granted; or should be surrendered, in point of law, by the acceptance of the new lease; or should be surrendered, ended, or \*determined, within a year from making [\*11]

(a) 1st Vol. p. 14. (aa) 7 Bro. Par. Cases, 432. (b) 1 Ball and Beatty, 28.  
(c) *Coppin v. Fernyhouse*, 2 Bro. C. C. 291.

the lease (d). Many titles are defective for want of attention to these particulars.

The surrender is frequently taken from the *cestui que* trusts, instead of from the legal tenant. This is erroneous.

Sometimes, also, no actual surrender is made ; and the new lease, instead of being granted, as it ought to be, to the legal tenant, under the former lease, is granted to the *cestui que* trust ; so that there is not any virtual surrender of the subsisting lease.

This is also a defect, unless there be an actual surrender by the legal termor ; and whenever the defect occurs, and remains material to the title, all persons concerned in interest at law and in equity, at least at law, should assist in completing the title, and in making an effectual surrender, and in obtaining a new lease.

But such defective leases, though voidable by the successor, are good against the lessor himself ; and eventually a title which was defective on this ground, may become good by the acceptance of a new lease, when the title is so circumstanced, by effluxion of time, or by a subsequent surrender, &c. that it is free from the objection which existed at the date of a former lease.

[\*12]

\*6thly, *Merger, &c.*

Terms, like all other particular estates, are liable to merger in the estate next in reversion or remainder.

Whenever it may be necessary to apply the learning of merger, the third volume of the *Practice of Conveyancing* will afford material information.

These leading points should be kept in mind :

1st. A legal estate cannot merge in an equitable estate ; but sometimes an equitable estate may be extinguished in the legal estate.

2dly. A remainder or reversion cannot merge in a prior particular estate ; but the prior particular estate must, if any merger take place, be absorbed by the reversion or remainder.

3dly. The better opinion is, that one term may merge in another, although the term in reversion or remainder be for fewer years than the term comprised in the prior estate.

4thly. A term which a person has as executor, administrator, or in right of his wife, will not merge in the freehold or inheritance which he had before the term became vested in him by such act of law. Nor will a term so held in another's right be merged by a subsequent descent of the reversion or remainder (e).

[\*13] \*But a purchase of the reversion or remainder by a person having a term in another's right, will occasion a merger of the term, even though the purchaser be a trustee of the term.

5thly. The term will merge as to that part or share only in which the same person has the reversion or remainder, and also the term. So that if he have the term in the entirety of the lands, and the rever-

(d) 32 Hen. VIII. c. 22 ; 1 Inst. 44 b.

(e) *Platt v. Sleep*, Cro. Jac. 275.

sion or remainder in one third part of the lands, the term will merge as to one third part only.

6thly. Although the term, and the reversion or remainder, be limited by the same deed or will; as to *A* for years, remainder to *A* for life, the term will merge, except in particular cases; as, where *A* is tenant for the life of *C*, remainder to *A* and *B* for life: in that case, on account of the joint tenancy, the estate for the life of *C* will be protected (ee). But the same person may be tenant for life, with remainder for years (f).

*A* made a mortgage for a term of 500 years, and afterwards another mortgage for a like term. Both the mortgages were satisfied, and the terms were assigned to distinct trustees; one term to each trustee, upon trust to attend the inheritance. Some time afterwards the owner of the fee took an assignment of the first term with an intent to merge it, or have it surrendered; but it was held that the merger was \*prevented by the intervention of [\*14] the other term outstanding in another person (g).

This case shows how cautious the conveyancer should be in surrendering a term. The surrender should be to the person having the next immediate estate in remainder or reversion. This cannot always be done with certainty, for want of knowledge of the precise state of the title; and it seems advisable in those cases, to make the surrender by deed-poll, and generally to the person or persons then having the next immediate estate in remainder or reversion. In this mode, the term would, it should seem, be effectually extinguished.

The practice of using words of assignment as well as of surrender is even still more eligible and safe.

#### 7thly, *Succession.*

In investigating titles under leases, it is also necessary to be satisfied that the right by succession or transmission is consistent with the rules of law, and the nature of the title.

These points will be examined under the heads of Titles under Heirs, Special Occupants, General Occupants, Executors and Administrators.

#### 8thly, *Renewals, &c.*

Under the head Tenant-Right, some points connected with the learning of renewals are \*noticed. Others will be noticed under the head Surrenders, &c. [\*15]

The general rule is, that renewed estates are subject to the same uses, or rather trusts, as the estates which existed under the old leases.

By different acts of parliament, incapacitated persons are, under

(ee) *Wiscot's case*, 2 Rep. 60.

(f) 1 Inst. 54 b; 3 *Preston's Practice of Conveyancing*, 44, 45.

(g) *Whitchurch v. Whitchurch*, 2 P. Will. 236.

certain circumstances, and in certain modes, enabled to renew, and to make surrenders for the purpose of renewal.

Frequently by wills, &c. lands held for freehold leases are limited by way of strict settlement.

With a view to future renewals this is highly improper ; since, in the case of a limitation to *A* for life, with limitations over to his unborn sons, with an interposed remainder to trustees for preserving remainders, no effectual surrender can be made unless by an act of parliament, or the decree of a court of equity, sanctioning the act of a trustee to destroy the contingent remainders.

To avoid all difficulty on this subject, the legal estate should be vested in the trustees to renew, &c. and to raise fines, &c. and subject thereto, the equitable ownership should be settled ; or at least if the legal estate be limited to the beneficial objects of the settlement, a power by way of use should be given, enabling the trustees to surrender, &c. mortgage, &c.

And as the absence of a trustee may prevent either an [\*16] \*actual surrender, or an exercise of a power given to several persons jointly, a power might be so penned as to authorize the exercise of it by such of the trustees as may be in England, and not under any incapacity to surrender.

The learning respecting terms of years, &c. is of essential importance to titles, since the property held under leases and terms of years, and other chattel interests, is of immense value ; and the practice of keeping terms on foot to attend the inheritance, renders this learning still more extensively useful. In the *Essay on the Quantity of Estates* a summary of the learning respecting the constituent parts of terms of years will be found. The subject should be pursued in *Bacon's Abr.* chap. Leases, and Chief Baron *Comyns's Digest*, title Estates ; and the learning respecting attendant terms is collected in *Comyns's Digest*, Chancery (*h*) ; in Mr. *Buller's Annotations* on Coke on Litt. and by Mr. *Sugden* in his *Vendors and Purchasers*. The rules of law and practice, applicable to the assignment of terms and of attendant terms, will be inserted in two chapters of the fourth volume of the *Practice of Conveyancing*.

In reference to terms of years, the more prominent points to be considered are,

1st, The right of the lessor to lease.

2dly, The capacity of the lessee to receive the lease.

[\*17] \*3dly, The right or ability of an assignee to assign the term.

4thly, The capacity of an assignee to receive the term.

5thly, The deduction of the title under the term.

6thly, The accuracy of the words descriptive of the parcels.

7thly, The competency of the words of limitation in the lease, or in the assignment.

The law respecting the date of the lease ; the commencement of

the lease ; the duration of the lease ; the mode of computing the time of duration or continuance, next present themselves for consideration.

To dilate on all these heads would be to waste the time of the student, and withdraw his attention from those works which contain ample information on the subject.

A general outline will be found in the Essay on the *Quantity of Estates*. However, a few points of contrast will be useful.

1st, Leases for lives confer freehold interests; leases for years, or for years determinable on lives, are chattel interests.

2dly, Leases, and other assurances limiting estates for lives, must be measured by the life or lives of a person or persons in being at the date of the grant, &c. or by some event connected with a life or lives in being, as widowhood, &c. The like observation is applicable to copyhold grants for lives; and each grant [\*18] \*must pursue the custom, and be of the entire tenement at the ancient rent, customs, &c.

3dly, Terms of years may be either absolute, or with a collateral determination.

They may be, and frequently are, determinable on a life or lives. This collateral determination may be marked by the life or lives of a person or persons to be born, as well as of a person already born; as, if *A* and *B*, or either of them, should so long live; or if *A* and *B*, and their first son to be hereafter born, or any or either of them, should so long live.

4thly, A lease to *A*, for the life of *A* and *B*, gives an estate while they and the survivor of them shall live.

A lease to *A*, while *A* and *B* shall be justices of the peace, or shall be resident in Norfolk, will determine on the death of *any one* of them; or when either of them shall cease to be a justice of the peace, or to be resident in Norfolk.

A lease for years, if *A* and *B* shall so long live, will determine when either of them shall die. Hence the practice to add, when the intention requires it, "If they or either of them should so long live."

5thly, At the common law, leases for lives, of lands in possession, must be completed by livery of seisin, or made by lease and release, &c. Estates for lives under powers, may be, indeed ought to be, created without livery.

When livery is made, it is not of any avail.

Leases for years may be created without \*deed, unless [\*19] they be of the *reversion*. They might, by the common law, be created without writing; and now may be created by parol, with writing, evidencing the contract; and *reversionary* or future leases may be created in like manner.

But a lease of the reversion passing the estate and the services immediately to the lessee, cannot be created without a grant, and a grant cannot be effectual without a deed.

6thly, By the common law, estates of freehold cannot be granted  
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to commence *in futuro*. Leases for years, unless they be under a power, or some enabling statute, requiring the lease to be in possession, may be limited to commence from a time to come, or on an event.

And, under the learning of executory devises, and springing uses, estates to commence *in futuro* are good.

So trusts and estates in rents, &c. on the creation thereof, may be granted by deed or will, to commence *in futuro* (h h).

7thly, By the common law, leases, except a lease from an infant, may be good with or without any reservation of rent ; while leases under powers, or enabling statutes, must, in this and every other respect, conform to the power.

8thly, Though in the limitation of terms of years there must be words, marking with certainty, either in expression, or in [\*20] construction, \*the duration or continuance of the terms ; and in leases for lives there must be a certainty of the lives ; yet in the assignment of lands held for lives, or for years, all the estate may pass by words of grant, without any words of limitation to heirs, or to executors, or any words expressive of time.

This observation is applicable to deeds as well as wills.

9thly, Freehold estates for lives in lands, and of the legal estate, must, however created, be transferred by livery of seisin, or by lease and release, or other mode which is equivalent ; while estates in lands, under terms for years, may be transferred by mere writing, except they confer a title to the reversion and services ; and under such circumstances there must, it is apprehended, be a grant, or assignment by deed.

An end may be put to a term of years by extinguishment thereof in the reversion or remainder ; that is, by a surrender of the term (i).

An *interesse termini* cannot, in point of legal form, be surrendered ; nor enlarged by re-lease or confirmation (k). It may be re-leased ; of course it must be by deed ; and a deed importing to be a surrender may operate as a re-lease. This interest may be assigned (l) ; it is transmissible to executors (m) ; or it may, [\*21] as well as an \*actual term, be *virtually* surrendered by the acceptance of another term of years, or other estate, incompatible with that interest.

*Merger* is another mode of extinguishing a term of years.

And a term of years may be defeated by a *condition*, or a proviso of *cesser*.

It is frequently necessary, in the investigation of a title, to ascertain that the condition or proviso of *cesser* has operated ; in other words, that the events have happened.

The surrender of a term which has been long dormant is sometimes presumed (n).

(hh) *Preston's Essay on Estates*, chap. Freehold.

(i) *Preston's Shep. Touch.* chap. Surrender.

(k) 1 Inst. 46 b. 270 a. 298 a.

(l) 1 Inst. 46 b.

(m) *Ibid.*

(n) *Doe v. Sybourn*, 7 Term Rep. 2 ; *Goodtitle v. Jones*, 7 Term Rep. 47.

The late case of *Doe d. Graham v. Scott* (o), has induced great caution in relying on the presumption of the surrender of a term (oo). Of a term which has been assigned to attend the inheritance, unless the title to the inheritance has been in opposition to the trust declared of the term, no surrender will be presumed; and no less time than twenty years will raise the presumption that a mortgage term has been surrendered (p); nor twenty years without circumstances (pp); and the late decision in *Cholmondeley v. Lord Clinton* and others (q), has \*greatly shaken the confidence [\*22] which, in practice, used to be placed on such presumption.

When the possession has been adverse against the inheritance, and against a term of years carved out of the inheritance, the title obtained against the termor by adverse possession will protect the possession against ejectment, though the seisin may be regained in a real action by the owner of the inheritance. But according to Lord Coke (r), "if lessee for years be ousted, and he in the reversion disseised, and the lessee re-lease to the disseisor, the disseisee may enter, for the term of years is extinct and determined;" and Lord Coke further observes, "But otherwise it is in case of a lessee for life; for the disseisor hath no term of years whereupon the lease of lessee for years may enure (s)."

When a term of years is in two joint-tenants, an assurance by one of them will not pass more than his moiety or share; yet one of several executors or administrators may assign the entirety of the lands, or demise them for all or any part of the term (t).

And an assignment purporting to be from several executors, and executed by one only of them, will be effectual for the entirety.

This point was once doubted. It was afterwards treated in practice as the opinion most consistent with the nature and office and power \*of an executor. And the point was lately [\*23] considered, and so ruled by Ch. J. Gibbs, at nisi prius, and so decided in Chancery.

### *Of Titles under Tenants by Statute Merchant, Staple, &c.*

TENANTS by statute merchant, staple, elegit, &c. have, in point of law, an interest measured by the quantum of their debt; but in equity they have merely a security for money.

Their interest is of a chattel quality, and not of freehold tenure; though by the special provision of the acts of parliament, under which their interests originated, tenants under statutes merchant and of the staple may maintain an assize, which is by the common law a remedy proper to an estate of freehold.

If the debt be 100*l.* and the extended value be 5*l.* per annum, the estate will continue to the end of twenty years; but the estate may

(o) 11 East, 478.

(oo) But see *Doe v. Hilder*, 2 Barn. & Ald. 782.

(p) *Doe v. Calvert*, 5 Taunton, 170.

(pp) *Doe ex dem. Hall v. Surteis*, 5 Barn. & Ald. 687.

(q) 2 Merivale, 171.

(r) 1 Inst. 272 b, and 273. a.

(s) 1 Inst. 273 a.

(t) *Preston's Shep. Touch.* 484.

determine at an earlier period by casual profits ; and the account may be taken at law on the writ *venire facias ad computandum*.

At law, the extended value only is regarded, and this value is generally far below the actual value, so as to make an allowance for the loss of interest, &c.

But in equity, the estate is considered merely as a security for the debt, interest and costs ; and the estate of this tenant may be [\*24] redeemed like a mortgage, on payment of the principal, \*interest and costs ; and the account will be taken according to the actual, and not to the extended, value (u). Whether there be any limit of time, after which a court of equity will not administer this relief, is a point on which no decision has been found.

These interests being of a chattel quality, may be assigned as other chattel interests, without livery of seisin, or may be bequeathed by will as personal estate ; and on the death of the tenant they will devolve to his executors, or other personal representatives, or pass to a legatee by bequest, and assent to that bequest.

The estate may be in reversion, or in possession ; and one estate of this description may, it should seem, merge in another estate of the like description (x).

And certainly it may merge in a term for years, or any estate of freehold ; and it may be surrendered to the person who hath the next estate in reversion or remainder (y).

A person who buys an estate of this description must consider it rather in the nature of a mortgage, and consequently redeemable, than as an actual and absolute ownership.

The like observations are for the most part applicable to [\*25] the estate of executors, and trustees, \*who hold lands till debts are paid ; for their estates will determine when the debts are paid. In the case of a tenant by statute, &c. the estate will not determine except there be a judgment on the writ *venire facias ad computandum*, ascertaining that the debt is satisfied (z).

Under the same description may be classed the estates of persons who hold *quousque*, as in the instance of rights of entry, granted by annuity deeds, and by conditions of re-entry, in which the feoffer, &c. is to hold till, &c. (a).

Some of these interests devolve to the heir ; but when they attach and become vested they are chattel interests (b).

#### *Under Tenants at Will.*

AT this day tenancy at will cannot arise without express grant or contract. All general tenancies, with the exception of the tenancy of a mortgagor, under his mortgagee, and of a *cestui que trust*,

(u) *Marsh v. Lee*, 2 Vent. 338.

(x) *Dighton v. Grewille*, Ventris, 231 ; *Collis's Parliamentary Cases*, 64.

(y) 3d vol. of *Preston's Practice of Conveyancing*, pp. 177. 185.

(z) *Preston's Shop. Touch.* 358.

(a) *Jemott v. Cowley*, 1 Siderf. 344 ; *Sir Tho. Raym.* 135. Litt. sec. 327.

(b) *Jemott v. Cowley*, 1 Siderf. 343.



under his trustee, are, by implication, and constructively, from year to year.

A mortgagor, or a *cestui que* trust, though accounted for many purposes a tenant at will, is so by implication only, and in a secondary sense. Such tenancies from year to year may devolve to the executors or administrators, or may be assigned.

\*An actual tenant at will has not any assignable interest. [\*26] His interest, however, admits of an enlargement by re-lease (c).

### *Under Copyholders.*

For some purpose a *copyholder* is considered as tenant at will.

He has a tenancy, so far that his estate may be enlarged and converted into a freehold interest by re-lease of the lord (d). In all other respects the duration of his interest depends on the extent of the customary grant, and the custom of the manor. He will be tenant in fee, in tail, or for life, according to the form of the grant; and, informal words, warranted by the custom, may pass the inheritance, as a grant to a man to hold *sibi et suis*. The copyholder cannot have a fee when the custom is to grant for life; but a custom to grant in fee warrants a grant to a man and the heirs of his body; and a custom to grant to several successively for three lives warrants a grant to one person for three lives (e).

His alienation must be governed by the modes prescribed by the custom of the manor.

In general no estate can pass *inter vivos* without a surrender. As against an heir of a deceased tenant, a will, and a surrender to the use of that will, was necessary.

\*As to persons dying after the twelfth day of July, 1815, [\*27] the necessity of a surrender to the use of a will is superseded (f).

This statute will give occasion to a series of decisions devolving numerous questions of great nicety.

Equitable estates may pass by contract, or by will, without any surrender to the use of the will. And if there be any estate tail, the customary mode of barring the entail must be observed (g).

This rule equally prevails when the estate tail is of the equitable, as when it is of the legal, ownership, except as to the equitable estate tail in particular cases, in which the tenant in tail has done every thing in his power to bar the entail, and has been prevented by fraud, or breach of trust in his trustees, from accomplishing his intention (h).

It is now agreed that the equitable tenant in tail of a copyhold

(c) Litt. sec. 460.

(d) 2d vol. of Preston's *Practice of Conveyancing*, 284.

(e) *Smartle v. Penhallow*, 2d Lord Raym. 994.

(f) Statute of 55 Geo. III. c. 192.

(g) *Pullyn v. Middleton*, 9 Mod. 483.

(h) *Otway v. Hudson*, 2 Vern. 585; *Pullyn v. Middleton*, 9 Mod. 483.

estate may suffer an equitable recovery ; and it should seem that the case of *Otway* and *Hudson* will be applicable only when the lord refuses to allow the equitable tenant in tail to suffer a recovery in the lord's court, and the trustees also refuse to make a surrender to the use of the *cestui que* trust, as tenant in tail, so as to [\*28] give him a \*legal estate tail, and qualify him to suffer a legal recovery in the lords court.

In general a customary recovery is the proper mode of barring an entail of copyhold lands.

In some manors, however, the entail may be barred by a surrender ; or a surrender to the use of a will ; or by a forfeiture and regrant ; and two or more of these modes may be concurrent ; so that either of them may be sufficient. And when lands may be entailed, it is of necessity, in intendment of law, that the entail may be barred ; and it may be barred by a surrender to the use of a purchaser, or of a trustee or even a surrender to the use of a will, unless some special mode of barring the entail has been prescribed by the custom of the manor.

Some manors do not admit of entails ; and when no entail can be created of the legal estate, none can be created of an equitable estate ; and therefore, an attempt to create an estate tail by way of trust, in lands which do not admit of an entail at law, will be nugatory.

Instead of aiming to create an entail, there should be special limitations of trust, adapted, as near as may be, to limit an interest, assimilated to the nature of an interest under an estate tail.

[\*29] This may be done by way of trust for such \*person or persons, as for the time being, within the period of certain lives, and twenty-one years, shall be seised of the freehold lands under or by virtue of the settlement made thereof, or any conveyance to be made, or fine levied, or recovery suffered thereof ; so that the same, &c. may go, devolve, &c. to the same person, &c. or the copyhold lands may be directed and declared to be held in trust, &c. for *A* for life, with limitation to his first son ; or his first son who shall attain twenty-one, or die under that age, leaving issue living at his death, for an estate in fee, with suitable limitations over ; or to *A* and his heirs, and if he should die without issue living at his death, then over.

Limitations of copyhold lands, in the form of estates tail, are considered as conditional fees, when the lands do not admit of an entail.

For this reason, and also because certain hereditaments, not being tenements, are not entailable, the doctrine of *conditional fees* ought to form part of the study of the conveyancer.

In some manors, and the manor of *Dymock* in Gloucestershire affords an instance, the custom warrants grants to the tenant and the heirs of his body ; so that no tenant has the fee-simple. Estates thus circumstanced give occasion to these and similar observations.

[\*30] It should seem, that by the custom of this \*manor the

course of devolution must be to the tenant and the heirs of his body, with a right, through a customary conveyance or alienation, on the surrender to the lord, and a new grant, to alien to another and the heirs of his body. It should seem, also, that the descent will be to the tenant and the heirs of his body; and if the legal estate be descendible in this manner, the equitable estate must, it should seem, although this is doubtful, be descendible in like manner; and difficulties may arise in deciding whether this estate is a conditional fee at the common law, admitting of alienation in any other manner than to a new tenant and the heirs of his body; and also, whether the equitable interest will be descendible to a man and his heirs generally, while, by the custom of the manor, the legal interest is confined in its descendible quality to the tenant and the heirs of his body.

Though in general copyhold lands will not pass without a surrender, or other customary mode of alienation, yet even by the common law, a deed will, in some cases, be effectual to perfect the title; and in other cases deeds are made necessary by particular acts of parliament. Thus there may be a re-lease of a right by deed from a person who has a mere right or title, to a person who is in possession, and has obtained admission (i). Also, one of several *\*joint-tenants*, or, it should seem, *coparceners*, may re-lease [\*31] to his companions, and the tenant may re-lease to the lord, or the lord to the tenant. Also there may be a lease by deed, provided such lease be warranted by the custom of the manor, or by the license of the lord; and the estates of bankrupts pass by bargain and sale enrolled; and sales under the land-tax act are to be made in like manner.

But one tenant in common cannot re-lease to another. Each tenant in common is a tenant of a distinct tenement.

And although rights, &c. may be re-leased by deed, they may also be re-leased by surrender; and married women having rights, cannot re-lease these rights by mere deed without a surrender; and therefore to bind the rights of a married woman there must be a surrender to give effectual operation to the re-lease.

So also equitable estates may pass by deed. They will also pass by any customary mode of alienation; and the owner of an equitable estate may, independently of the late statute, give his property by will, without a surrender to the use of the will. Such gift, by will, will be valid whether the testator has the trust, or an equity of redemption, provided the legal estate be out of him at the time of publishing his will (k).

\*A copyholder, however, who retains the legal estate after [\*32] a mortgage made by surrender, and before admission of the mortgagee, could not have devised the lands without a surrender to the use of the will. Nor will the will become operative by relation,

(i) *Kite v. Quinton*, 4 Rep. 25.

(k) *Kenebel v. Scraston*, 7 Ves. 497.

as an admission of the mortgagee ; thus changing the legal estate into an equity of redemption (l).

But surrenders will not operate by way of *estoppel* ; and considerable difficulties may be experienced in finding any mode of assurance which will produce the effect of an *estoppel*.

When there is a contingent remainder in copyhold lands to a person not ascertainable, as to the survivor of several persons, or to persons who may answer a given description, there is not any effectual mode of barring this possibility without any interest.

So an expectant heir cannot bind his future interest by surrender (m) ; and though he becomes heir, the succeeding heir will not be bound by his contract before he was heir (n).

But all other interests of a contingent or executory nature, to a person ascertained, may, it is apprehended, be barred or extinguished.

A re-lease by persons adult, &c. not under coverture, will certainly extinguish their right.

[\*33] \*And on principle, it should seem that a surrender from husband and wife, entitled in right of the wife, will have the same effect as a fine. At all events, there is reason to conclude that a common recovery by them will preclude all right on her part.

For it is absurd, and contravenes the policy of the law, that there should exist a right or title, coupled with an interest, without any means of barring that interest.

The maxims are, *unumquodque dissolvi potest eo ligamine quo ligatur*—*nil tam conveniens est naturali æquitati quam voluntatem domini rem suam in alium transferre, ratam habere* (o) ; and it is submitted that the whole system of our laws proves that contingent as well as vested interests are within the principle and the reason of these maxims.

And though the exception in the case of a contingent interest in tail be admitted, this is in consequence of the statute *de donis*, and of the law applicable, by analogy, to copyhold lands, and not of the original rules of the common law.

There may be a special occupant of copyhold lands ; but there cannot be a title by general occupancy (p).

[\*34] On a grant to a man for three lives, the \*grant will determine on his death, unless the heirs be special occupants (q).

So if the fee be limited to *A* for the life of *B*, with remainders over, the estate of *A* will determine on his death, though *B* be living.

The lord will, it should seem, be entitled to hold during the life of *B* (r).

At least there are some instances in which the lord shall have

(l) *Kenebel v. Scrifflon*, 7 Ves. 497. (m) *Goodtitle v. Morse*, 3 Term Rep. 365.

(n) *Morse v. Faulkener* and others, 1 Anstr. 11. (o) 1 Rep. 100.

(p) *Smartle v. Penkettow*, 2 Lord Raym. 994.

(q) *Zouch v. Foss*, 7 East, 186.

(r) *Combe's case*, 9 Rep. 75.

the interest between the determination of one estate and the commencement of another estate (*s*).

Contingent remainders of copyhold lands do not admit of destruction by the surrender of a tenant for life.

But a remainder may fail, because the particular estate determines before the remainder can vest in possession.

And it is considered to be law, that a copyhold estate in fee, of the legal ownership, cannot be granted to commence *in futuro*.

Though there cannot be a *general* occupant of copyhold lands, yet the custom may prescribe the successor; thus the wife may be the *quasi* heir; as on a grant to one for the lives of three persons; the persons named as lives may by custom, but not without a custom, become the copyhold tenants (*t*).

And although the executors may not take at \*law, so as [\*35] to become occupants, yet the equitable interest, under a copyhold grant for lives to trustees, will devolve to the executors, &c. of the *cestui que* trust, unless the heirs be entitled as specially named. Such equitable estates for lives admit of *quasi* entails.

And though equitable interests in copyhold tenements held for lives may be *quasi* personal estate, for the purposes of succession or transmission, yet it should seem, that a husband alone, or the husband and wife, except by a surrender, cannot alien this life-interest of the wife.

#### *Tenant by Sufferance.*

A tenant, or rather a late tenant, occupying by sufferance, has not any estate; he has merely a naked possession. The consequence is, he has not any estate to transfer, to transmit, or to surrender, nor any interest capable of enlargement by a release.

#### *General Observations.*

As to all those tenants who have transferable or transmissible interests, one general observation may be made. Care must be taken, in deriving a title from them, to consider the effect of their conveyances; and to understand them as good in point of valid title, only according to the degree of interest which was vested in the grantor, or at least within the power \*or scope [\*36] of ownership of the grantor at the date of his conveyance; not to be misled by the words of the deed; and to conclude that a fee has been conveyed merely because the deed imports to convey a fee.

The next thing to be considered is, whether the deed or other conveyance was proper, and effectual to pass the interest which it imported to convey; or whether the defect has been cured by adverse possession, nonclaim on a fine, and the like, or by release or

confirmation of the persons capable of releasing or confirming ; or whether the defect has become immaterial from subsequent causes, as the determination of a particular estate, or by some other event, by which an estate once defeasible or determinable has become absolute or indefeasible under the statute of limitations, or the statutes of non-claim on fines.

And in regard to recovery deeds, and recoveries defective, for some cause connected with the title deeds, more than ordinary caution is requisite for the purpose of ascertaining that the defects have been cured. For instance, if one recovery has been defective, for want of a good tenant to a writ of entry, care must be taken that this defect has become immaterial by the failure of the estate tail, &c. or that the defect has been supplied by another recovery, or fine, or some other adequate assurance.

But if another recovery, which has been suffered, was [\*37] essential to the validity and \*completion of the title, it is particularly incumbent on the conveyancer to scrutinize, with particular diligence, the title to the freehold ; and to take care that the freehold was vested, during the term in which the recovery was suffered, in the tenant by whom the second recovery was suffered.

For example, if *A* be tenant for life, with remainder to *B* in tail ; and *A* mortgages to *C* and his heirs ; and afterwards *A*, without the concurrence of *C*, convey to *D*, to the intent that a common recovery may be suffered in which *B* is vouched and vouches over, this recovery will be defective for want of a good tenant to the writ of entry ; since, during all the term in which the recovery was suffered, the freehold was in *C*, and not at any time in *D* ; but if *A* die, and another recovery is suffered, the defect in the former recovery becomes immaterial, so as the second recovery be duly suffered.

Especial care must be taken that in the second recovery the freehold was vested in the person named as tenant for that recovery.

In practice, it will be found that more titles are defective for want of a good tenant to the writ of entry than from any other cause.

In complicated cases it will, on consideration of the abstract, be proper to arrange the title under the freehold, by way of analysis, so as to consider the state of the title to the freehold distinctly.

[\*38] \*Thus the whole attention will be confined to one object, and enable the mind to encounter and to subdue any difficulty.

### *Of the Power of Alienation depending on the Qualities of Estates.*

HITHERTO the power of alienation arising from the quantity of

estate has been considered. It will now be proper to add the leading observations which arise on the qualities of estates ;

Considering them as estates,

In sole tenancy or severalty.

By entireties.

In joint-tenancy.

In coparcenary.

In common.

In possession.

In reversion.

In remainder.

Vested.

Contingent.

Executory.

Absolute.

Conditional.

Defeasible.

Legal.

Equitable.

And it is observable, that the same persons may be joint-tenants, or tenants by entireties, or tenants in common of one estate ; and they, \*or any one or more of them, may have another [\*39] estate of a different quality (u).

*As to sole Tenants.*

A sole tenant is to be considered as having the entirety, and consequently he may convey the entirety, or any portion of it ; and thus if he convey a portion he ceases to be a sole tenant, and becomes tenant in common. For many purposes, each tenant in common has a sole or several seisin, or title ; a distinct tenement ; and hence the multiplication of entire services ; but no tenant in common has a *sole tenancy* in the sense now intended to be expressed.

*As to Tenants by Entireties.*

A tenancy by entireties is peculiar to a gift to two persons, being, at the time when the gift takes effect, husband and wife (x).

This species of tenancy arises from the legal notion of the unity of their persons (y).

It may exist in application to an estate in fee, in tail, for life, or for years, or other chattel real.

Several consequences flow from the nature and peculiar qualities of this tenancy :

1st. If a grant be made to, or to the use of, three persons jointly, and two of them are \*husband and wife, the three [\*40] together are joint-tenants as between themselves ; but the

(u) 1 Inst. 183 b.

(x) 1 Inst. 187 ; Wing. Max. 211.

(y) 1 Inst. 112 a. 187 b.

husband and wife are tenants by entireties as between themselves (z).

And for that reason the wife cannot under such gift be remitted for more than a moiety (a), as will be afterwards noticed.

For all the purposes of ownership, the husband and wife have only one moiety, and their companion in the tenancy has the other moiety.

Thus in the language of *Litt. sect. 291* ; “ Also, if a joint estate be made of land to husband and wife, and to a third person, in this case the husband and wife have in law, in their right, but the moiety, and the third person shall have as much as the husband and wife ; viz. the other moiety, &c. ; and the cause is, for the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath, by force of the jointure, the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife, and to two other men ; in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causa qua supra*.”

On the death of the husband and wife in the life-time [\*41] of their companion, and without having \*severed the joint tenancy, their companion will be entitled to the whole, or entirety, by survivorship.

So if the companion die in the life-time of the husband and wife, or either of them, and without having severed the joint-tenancy, the entirety will vest in the husband and wife if both be living, and in the survivor of them, if one of them be dead.

As between the husband and wife, the material difference arising from a tenancy by entireties is, that the husband has not, except as is afterwards noticed, any right, as against his wife, to alien any part of the lands, or, at the common law, to forfeit them by attainder or otherwise (b) ; but on the death of the husband in the life-time of the wife, the entirety, or (as the case may happen,) their moiety, will belong to her, notwithstanding any alienation by the husband (c), or his attainder, &c.

But a gift to a man and woman, or a gift to the use of a man and woman, who afterwards intermarry, and although the use be executed in them after the marriage, will not make them tenants by entireties (d). And even a husband and wife may, by express words, at least so the law is understood, be made tenants in common by a gift to them during coverture.

But a deed of feoffment to a man and woman jointly, before marriage, and livery of seisin to \*them after marriage, will give them the seisin as tenants by entireties (e).

The like law was applied to a grant to a man and woman jointly before marriage, and attornment to them after marriage (f).

(z) 1 Inst. 187 b. 356.

(a) 1 Inst. 356.

(b) *Wimbish v. Talbot's case*, Plow. Com. 58 b ; 1 Inst. 187 b.

(c) 1 Inst. 326 a.

(d) 1 Inst. 187 b.

(e) *Wigate's Maxims*, 211 ; 1 Inst. 187 b.

(f) *Ibid.*



In each of these instances no estate passed till livery in one case, and attornment in the other case.

So a recovery in value by husband and wife, on a voucher to warranty, shall render them tenants by entireties, although they recovered by force of a warranty, annexed to an estate of which they were joint-tenants (g).

On the same ground, a devise to a man and a woman jointly, who intermarry between the date of the will and the death of the testator, would confer a title on the husband and wife by entireties, *sed quære*.

But the authorities cannot with equal reason be applied to a bargain and sale to a man and woman before marriage, and enrolment after marriage.

The case of the use before the statute, and the execution after the statute, depends on the enactment of the statute of uses (h). That statute executes the possession according to such quality, manner, form, and condition, as they had in the use (i).

And when the husband and wife are seised as \*joint- [\*43] tenants, or tenants in common, the husband may alien his particular share, and such alienation will be good as against his wife, and all claiming under her (k).

It is also to be understood, that if husband and wife be tenants by entireties of a term of years, or other chattel real, then, with the exception of the instance in which the term is a provision for the wife under some agreement preparatory to the marriage, the husband alone may assign the term.

And let it be remembered, that husband and wife may, by a gift to them before they are husband and wife, be joint-tenants, either in fee, fee-tail special, for life, or for years, or of any chattel real.

In all these instances they may be tenants in common.

Even when there are joint-tenants in special tail they may become tenants in common by a severance of the joint-tenancy.

Under a tenancy by entireties, the freehold is in the husband, so far that he alone is, or at least can make, a good tenant to the writ of entry (l); but all charges, &c. by lease, or by conveyance made by him, will be void as against his wife, in the event of her being the survivor, in like manner as if the husband had been seised only in right of his wife.

Even when the husband and wife are tenants in tail by entireties, no fine to be levied, or \*recovery to be suffered [\*44] by the husband alone, will be prejudicial to his wife in the event of her being the survivor (m).

The cases which arise out of tenancies in tail by entireties are deserving of particular attention; and the distinctions which exist between the operation of fines and recoveries, by one of several

(g) *Nichols's case*; *Flow. Com.* 483; 1 *Inst.* 187 b.

(h) 27 H. VIII. c. 10.

(i) 1 *Inst.* 187 b.

(k) 1 *Inst.* 187 b.

(l) 1 *Preston's Pract. Convey.* 55. 155.

(m) *Beaumont's case*, 9 *Rep.* 138; *Baker v. Willis*, *Cro. Car.* 476.

donees, being tenants by entireties, must be regarded with particular attention.

In the first place it will be proper to notice, that when a gift is made to a man, and his heirs begotten on a particular woman, he alone is the tenant in tail. So when a gift is made to a woman, and the heirs of her body by a particular man, the woman alone is the tenant in tail. The issue must claim as her heirs by this man, and not in any manner as the heirs of the man. The like observation is applicable to two persons who are married, or may lawfully intermarry, and the heirs of the body of one of them, begotten by or on the body of the other donee. No act therefore, either by fine, or recovery, proceeding in one case from the man, or in the other case from the woman, not being the donee in tail, can be a bar to the heirs in tail.

Also, when a gift is made to two persons who are not married, but who may lawfully intermarry, and the heirs of their body [\*45] dies, or the heirs which one of them shall beget on the \*body of the other, so that they are joint-tenants in tail, both of them, jointly, before or after the marriage, may, by levying a fine with proclamations, or by suffering a common recovery, effectually bar the estate tail; and in the instance of the recovery, the remainders and reversions expectant on the estate tail.

A fine levied, or common recovery suffered by one of them, would be a valid alienation of his or her particular share, but it will not prejudice the other donee for his or her share; but if one of them levy a fine with proclamations of the entirety, this fine will, by force of the statutes of 27 Henry VII. and Henry VIII. be a bar to the heirs in tail, even of the other ancestor, and take from the estate of that ancestor in his or her share, its descendible quality under the estate tail. Thus the other ancestor will have a fee descendible to his or her heirs generally, and not to his or her heirs in tail (m).

This fee may descend to the issue as the general heir, but he cannot take the land or share in his character of heir in tail: Of consequence, he must take as liable to the debts of his ancestor, and to the charges, &c. which that ancestor may have created.

This instance is an anomaly in the law. It proves that the heir in tail may be *barred* by the act of a parent, who, as to this share, has not any power of alienation.

[\*46] \*Although the estate tail be deprived of its descendible qualities, all the other beneficial incidents, as the right to suffer a common recovery, will remain (n). The extracts given from *Beaumont's* case in a subsequent page will more fully explain this point.

*Beaumont's* case, *Baker and Willis*, and *Errington and Errington* (o), deserve particular attention. They contain a large portion of useful knowledge applicable to cases of this description. They

(m) *Baker v. Willis*, Cro. Car. 476.

(n) *Beaumont's* case, 9 Rep. 138, and *Baker v. Willis*, Cro. Car. 476. (o) 2 Bulstr. 42.

also afford a large score of knowledge illustrative of other topics connected with the duty of the conveyancer.

Even when the husband and the wife are tenants by entireties the husband may discontinue the entail (p).

And when the husband and wife are *joint-tenants*, or tenants in common in tail, as distinguished from tenants by entireties, a recovery suffered by one of them will bar the entail in his or *her moiety*, and convey that moiety (q).

But when husband and wife are tenants in tail by entireties, a common recovery suffered by one of them in the life-time of the other will not bar the other parent, or the heirs inheritable under the entail (r), nor the \*remainder-men; and even [\*47] although the husband *should survive the wife*, yet it should seem the recovery would be inoperative as against the heirs in tail as well as the wife, &c. (s).

And if husband and wife are tenants to them and the heirs of the body of the husband, and a recovery is suffered by the husband alone as tenant, this recovery, by reason of the tenancy of the freehold by entireties, will not bar the entail as to the entirety, or any part (t).

But according to *Sheppard* in his Touchstone, the entail would, in this instance, have been barred even for the entirety, if the recovery had been suffered by the husband as *vouchee*.

The language of *Sheppard*, p. 45, is, "If lands be given to husband and wife, and the heirs of the body of the husband, with remainders over to strangers, and the husband alone doth discontinue, the whole land, by fine, feoffment, or bargain and sale indented and enrolled, and the writ of entry is brought against the discontinuee, and he doth vouch the husband alone, without the wife, and the husband doth vouch the common vouchee, and so a recovery is had; this is a good recovery for the whole land, and a bar to all the estates in tail, and remainder and reversion, but not to the estate of the wife for her life after the husband's death."

Also, after the death of one of the parents, \*the survivor [\*48] of them, except so far as that parent is restrained by the statute law, (as in the case of a woman tenant in tail, *ex provisione viri*) (u), will be competent to bar the estate tail, and the remainders expectant on that estate.

The following points are connected with the law respecting tenancy by entireties, and will illustrate that useful learning:

If a husband, wife, and a third person, had purchased lands to them and their heirs; and the husband, before the stat. of 32 Hen. VIII. c. 1, had aliened the *whole* land to a stranger in fee, and died, the wife and the other joint-tenant were joint-tenants of the right; and

(p) *Greenley's case*, 8 Rep.

(q) *Marquis of Winchester's case*, 3 Rep. 1.

(r) *Owen and Morgan*, 3 Rep. 5; *Preston's Shep. Touch.* 45. and *Practice of Conveyancing*, 142.

(s) *Owen and Morgan*, 3 Rep. 5 a.

(t) *Ibid.*

(u) 27 Hen. VII. c. 20.

if the wife had died, the other joint-tenants should have had the whole right by survivor ; for that they might have joined in a writ of right, and the discontinuance should not have barred the entry of the survivor, for that he claimed not under the discontinuance, but by title paramount above the same, by the first feoffment which is worthy of observation (x). But if the husband had made a feoffment in fee of *their moiety*, and he and his wife had died, their moiety should not have survived to the other.

The reason of the last proposition is sufficiently obvious ; for as against the joint-tenant the feoffment of the husband was [\*49] neither void \*or voidable, though, as against the wife, had she survived, the feoffment would have been voidable (y). Against the joint-tenant, the husband had a power of alienation over a moiety, and his feoffment severed the joint-tenancy.

To the extent of severing the joint-tenancy, the husband had the power of prejudicing his wife. But if the husband had conveyed the moiety of himself and wife, the joint-tenancy would have been severed, or suspended, while that conveyance remained in force (z). For a discontinuance made by the husband did take away the entry of the wife and her heirs by the common law, and not of any other which claimed by title paramount above the discontinuance (a) ; and therefore, if lands had been given to the husband and wife, and to a third person, and to their heirs ; and the husband had made a feoffment in fee, (of the entirety must be understood) this had been a discontinuance of the one moiety, and a disseisin of the other moiety. And if the husband had died, and then his wife had died, the survivor should have entered into the whole ; for he claimed not under the discontinuance, but by title paramount from the first feoffer ; and seeing the right by law doth survive, the law doth give him a remedy to take advantage thereof by entry, for other remedy for that moiety he could not have (b).

[\*50] \*In *Greenley's* case (c), a difference was taken and agreed between a *discontinuance* which implieth wrong, and a *lawful bar* which implieth a right ; and therefore it was agreed, that if lands are given to husband and wife, and to the heirs of their two bodies begotten, and the husband levieth a fine with proclamations, and committeth high treason, and dieth, and the wife before or after entry dieth, the issue is barred (d) ; and the conuses or the king hath a right to the land ; because the issue cannot claim as heir to both ; and therewith, it was said, agreeth 18 Eliz. 51 b. ; adjudged ; vide 5 Hen. VII. 32, *Colt's* Assize.

Also in *Greenley's* case (e), it was resolved, that the statute of 32 Hen. VIII. extended only to discontinuances, although the act hath general words, "or be prejudicial or hurtful to the wife or her heirs," &c. But the conclusion is, shall lawfully enter, &c. according to their rights and titles therein, which they cannot do when

(x) 1 Inst. 183.

(y) 1 Inst. 183.

(z) 8 Rep. 72.

(y) *Doe v. Parratt*, 5 Term Rep. 652.

(a) 1 Inst. 327 b.

(d) 9 Rep. 190.

(b) 1 Inst. 327 b.

(e) 8 Rep. 72.

they are barred, and have no right, title, or interest; and this statute giveth advantage to the wife, &c. so long as she hath right; but it doth not extend to take away a future bar, although the statute giveth entry without limitation of any time; but the entry ought to wait upon the right. And therefore, if the husband levieth a fine with proclamations to another, and dieth, now the wife may enter by force of the statute; for yet the fine is not

\*any bar to her, but her right doth remain, which she may [\*51] re-continue by entry; but if she surcease her time, and five years pass after the death of the husband, she is barred of her right, and by consequence she cannot enter, and the statute speaketh of fine only, and not of fine with proclamations; and therewith agreeth 6 Edw. VI. Dyer, 72 b.

And it was resolved, that if the husband be tenant in tail, the remainder to the wife in tail, that if the husband maketh a feoffment in fee, and dieth without issue, the wife may enter, because it was the inheritance of the wife. But if the husband suffereth a common recovery, and dieth without issue, there the wife is barred, and cannot enter by force of this statute; but this statute was made to relieve him who hath right, and to suppress wrong, and to advance right without respect to the warranty of the discontinnee, if he hath any. And if before the statute of *donis conditionalibus* lands had been given to husband and wife, and the heirs of their two bodies begotten, and they had issue, and the husband *post prolem suscitatum*, aliened the land, and died before the statute, and the wife survived, and died before the statute, the issue should have a formedon; for notwithstanding the same alienation a right did remain; forasmuch as the husband only aliened, which right is entailed by the statute; and before the statute the issue in such case might have a *sur cui in vita*, and claim as heir \*of the [\*52] body of both, for the feoffment was no bar, but a discontinuance; and therewith agreeth 21 Edw. III. c. 45; 12 Hen. IV. c. 7. And in all cases where the wife might have a *cui in vita* by the law, she shall enter by force of the statute of 32 Hen. VIII.; and where the issue cannot have a *sur cui in vita*, or *formedon*, there he shall not enter within the remedy of this statute. And therefore, if the husband hath issue, and alieneth, and the wife dieth, the issue shall not enter during the life of the husband, because at the common law he had no remedy to recover the land during the husband's life; and the words of the act are, "according to their rights and titles therein." But if the husband alieneth, and afterwards the wife is divorced *causa præcontractus*, or any divorce which dissolveth the marriage *a vinculo matrimonii*, there the wife during the husband's life, may enter, for the words of the act are, "no fines, feoffments," &c. "during the coverture between them," and although, that afterwards the husband and wife are divorced, yet the feoffment was made during the coverture between them. And although that the statute saith, "but that the same wife," &c. the same is meant of her who was his wife at the time of the alienation;

for when the husband dieth she is not then his wife, but she is called wife, to describe the person only who shall enter ; and it is not said in the statute that the wife shall enter after the death of her [\*53] husband, but \*generally, that she shall enter according to their right and title ; be it in the life of the husband, after a divorce *vinculo matrimonii*, or after his death.

In *Beaumont's* case (*f*), it was resolved that notwithstanding a fine with proclamations levied by the husband alone of lands, of which he and his wife were tenants by entireties, the wife, after the death of her husband, had an estate in special tail : and for the better understanding of the true reason thereof, it is to see by what law the estate of the wife shall be altered, and changed to an estate for life ; and first, it was resolved, that it was not by the common law ; for at the common law, if lands had been given to the husband and wife, and to the heirs of their two bodies, and after issue, the husband had aliened and died, this alienation had not barred either the wife or the issue in tail, because the husband alone had not power of aliening ; forasmuch as he had an undivided estate jointly with his wife ; and therewith agreeth 12 Hen. IV. *Formedon* 15 ; 21 Edw. III. 45 ; and by the statute of *Westm. 2, de donis*, &c. it is enacted, that a fine levied by tenant in tail *ipso jure sit nullus*. As to the case of 16 Eliz. of treason, whereof the husband is attainted, it is to know that such bar and forfeiture is by the statute of 26 Hen. VIII. c. 13, by which it is enacted, that [\*54] every offender convicted of high treason, &c. shall \*lose and forfeit to the king, his heirs and successors, all such lands, &c. whereof any such offender shall have any estate of inheritance ; but in the same act there is a saving to every person (other than the offenders, their heirs and successors) of all rights, titles, interests, &c. ; so that it appeareth that the estate of the wife, if she overliveth the husband, is saved by this act ; and that *the bar by the statute is only as to the issues in tail*, and not to the wife. And the reason of the resolution, that the heir is disabled in such case, is because he ought in his lineal conveyance, to make him heir, as well to the father as to the mother, by the opinions of *Catlyn, Wray, Saunders, and Dyer*. And as to the case of fine with proclamations in 18 Eliz. levied by the husband alone (*g*), the bar is made by the statutes of 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36 ; and in the statute of 4 Hen. VII. there is a saving for the wife, if she bring her action or lawful entry within five years after she shall be uncovered, as she did in this case (*h*) ; and by the statute of 32 Hen. VIII. the fine levied with proclamations of lands entailed to him who levieth the fine, or any of his ancestors, shall be a sufficient bar against the said person and his heirs, claiming by force of any such entail, and against other persons claiming only to their use, or to the use of any manner of heir of their body, in which

(*f*) 9 Rep. 140.

(*h*) *Beaumont's* case, 9 Rep. 138.

(*g*) *Dyer*, 351 b.

case there needeth not any saving for \*strangers; for [\*55] the purview of the act is special, and *secundum quid*, viz. against the heirs in tail, and others claiming to their use; and therefore *distinguendum est*, that the fine with proclamations levied by the husband, or the attainder of the husband of high treason, is a bar to the estate tail, *quoad* the issues in tail, but not *quoad* the wife; but that she, overliving, shall be seised of an estate-tail, which estate is saved to her by all the said acts; and the same is proved by the said book of 18 Eliz. (k), for there the husband, being jointly seised with his wife in special tail, levied a fine with proclamations to the use of him and his heirs, (which fine is a bar to the issue in tail,) and afterwards the husband devised the land to the wife for life, and died, there the wife entered and waved the estate-tail, claiming for life by force of the devise; which proveth, that if she had not waved the estate-tail she should have had it, and not an estate for life, as is supposed by the other side.

It is also agreed, that if a gift be made to a husband and wife in tail, so that the marriage between them, *for a cause which impedes a future marriage*, is dissolved, they have an estate of freehold only, in the nature of an estate-tail after possibility of issue extinct.

If they may again intermarry, why should they not be joint-tenants in tail? Is it because the gift was to them by entireties, and they \*cannot on a subsequent marriage hold in that mode? [\*56]

So if the husband discontinue the land of his wife, and after take back an estate to him and to his wife, and to a third person, for term of their lives, or in fee, this is no remitter to the wife, but as to the moiety; and for the other moiety she must after the death of her husband sue a writ of *cui in vita* (l).

So a wife tenant by entireties may be barred by nonclaim on the fine of her husband, as appears in the extract from *Greenley's case* (m).

If an estate be made to a villain, and his wife being free, and to their heirs, albeit they have several capacities, viz. the villain to purchase for the benefit of the lord, and the wife for her own, yet if the lord of the villain enter, and the wife survive her husband, she shall enjoy the whole land, because there be no moieties between them (n).

This point is added, because it is assumed to be law, in application to a husband and wife, who are purchasers by entireties, when one of them is an *alien*.

Also, if a man make a lease to A, and to a baron and feme, viz. to A for life, to the husband in tail, and to the feme for years; in this case, it is said, that each of them hath a third part, in respect of the severality of their estates (o).

\*The right of survivorship shall prevail against a husband [\*57] when his wife and another person are *joint-tenants of a term*, and the wife dies in the life-time of the other joint-tenant, and before severance (p).

(k) Dyer, 351 b.  
(o) 1 Inst. 187 b.

(l) Litt. § 676.  
(p) 1 Inst. 185 b.

(m) *Supra*, p. 50.

(n) 1 Inst. 187 b.

Though a husband and wife have a term of years as tenants by entireties, yet the husband may alien the entirety so as to bind the wife.

This point was decided in the case of *Grute v. Locroft* (q). In that case an under-lease by the husband alone prevailed against the surviving wife ; and on principle, the wife could not have the rent though the reversion belonged to her.

That the wife was bound flowed from the right of the husband to alien the term, which he and his wife had in her right.

Finally, a tenant by entireties, while such, has not any devisable interest, even as against his own heir (r) ; and as between husband and wife, a tenancy by entireties cannot become a *tenancy* in common, though they, as to their share may become tenants in common with a third donee.

#### *As to Joint-tenants.*

THE distinguishing feature of a joint-tenancy is the right of survivorship ; so that on the death of one or more of the joint-tenants, while the joint-tenancy continues, the estate will devolve to the survivors or survivor.

[\*58] \*But the right of survivorship may be defeated by severing the joint-tenancy ; or the joint-tenancy may be *suspended* by a *partial* alienation, as for life, or in tail, while that alienation continues in force ; and if one of the joint-tenants die while the joint-tenancy is suspended, the right of survivorship will, as to the share, or to which there is such suspension, for a time, be excluded.

Joint-tenants are not bound by the charges, (such as judgments, or mere annuities, or rent-charges,) of each other ; but each is bound by the alienation of the other, of his own share or *aliquot* part, either for all the estate, or for a portion of it. Even an execution under an *elegit*, &c. would carve out an interest binding on the survivors (rr).

Thus if joint-tenants be seised in fee, or for life, and one of them convey or assign his share, this alienation will sever the tenancy ; but should one of them demise *for years* (s), this demise, though it will bind the survivor, will not either sever or suspend the joint-tenancy.

If two joint-tenants in fee-simple be disseised by two persons, and one of the persons so disseised re-lease all his right to one of the disseisors, he merely confers a title to that moiety over which he has a right of alienation (t).

Had he survived before he made the re-lease, the right of the entirety would have passed from him.

[\*59] \*In consequence of the interest remaining in the other joint-tenant, the re-leasee obtained a good title to one moiety ; and of the other moiety the two disseisors remained joint-

(q) Cro. Eliz. 287.

(s) 1 Inst. 184 b.

(r) 32 Hen. VIII. c. 1 ; 3 Rep. 36.

(t) 1 Inst. 276.

(rr) 1 Inst. 185.



tenants, unless (and principle seems to oppose that conclusion,) the re-lease should operate on that particular moiety which was in the re-leasee.

And when two persons are joint-tenants, and one of them is adult, and the other a minor, and they make a conveyance in fee, this conveyance will be good for the moiety belonging to the adult, and void for the moiety of the infant; yet although the adult die, so that the infant becomes the survivor, yet he cannot avoid the feoffment of the adult joint-tenant (u).

But if two infants join in a feoffment, and one of them die, the survivor may avoid the feoffment as to both moieties, because there was a joint feoffment, and a joint title of entry (x).

But if each had made a distinct feoffment, the other, though the survivor, could succeed for his own moiety only.

And if two or more persons are joint-tenants in fee, in tail, or for any less estate of freehold, and one of them grant a particular estate of the freehold, retaining a reversion, this grant will suspend the joint-tenancy (y). Should the particular estate determine during the lives of the joint-tenants, the joint-tenancy will be revived. And the joint-tenancy will be severed as to [\*60] such share, in case the suspension should continue until the death of the joint-tenant who was the owner of that share, or of the owner, if there be only one, or of the survivor, if there be several, of the other share.

But if two or more persons are joint-tenants for years, and one of them demise for years, this demise will sever the joint-tenancy (z).

It is also observable, that if three or more persons are joint-tenants, and one of them, or, if there are four or more joint-tenants, two of them, sever the joint-tenancy, the remaining shares will be held in joint-tenancy (a); and even if two persons are joint-tenants, and one of them alien a portion of his share as a moiety of a moiety, there will be a severance only for the share so aliened, and an equal or corresponding share of the other joint-tenants; and the joint-tenancy will continue in force for the remaining shares. Thus if *A* and *B* are joint-tenants in fee of the entirety, and *A* alien a fourth part to *C*, *B* and *C* will be tenants in common of one moiety, so that each of them will hold one fourth part in severalty; and the remaining moiety will be held by *A* and *B* as joint-tenants.

The same rule applies when three or more persons are joint-tenants, and two or more of them re-lease a part only of their shares.

\*So if one of three or more joint-tenants re-lease to another [\*61] of them, the share so released will be held in severalty; and as to the remaining shares the parties will continue joint-tenants.

The re-leasee is in by way of conveyance or title as an assignee, and not under the original feudal contract (b).

(u) 1 Inst. 337 b.  
(z) 1 Inst. 192 a.

(x) 1 Inst. 337.  
(a) Litt. § 304.

(y) Litt. § 302, 303; 1 Inst. 193 a.  
(b) Litt. § 304; 1 Inst. 380 a.

But if a release be made by one of several joint-tenants to all his companions, they will continue joint-tenants as to the entirety, and be in under the original investiture. Such release must be by deed, and the re-leasees will be bound by the charge of the releasor (c).

So if he re-lease to some only of the joint-tenants, that share will be severed; but still the re-leasees will be joint-tenants, as between themselves, of the re-leased share; and they will in point of title, be assignees of the re-leasing joint-tenant.

The proper assurance between joint-tenants is a release from one to the other. One may re-lease to all. Several may re-lease to the others. One or more may re-lease to some or one of the others; and if they convey by lease and re-lease, or by feoffment, such lease and re-lease, or feoffment, will operate as a re-lease; but then there must be a deed; for mere livery of seisin, even aided by a mere writing, will not avail to pass the share of one joint-tenant to another joint-tenant; but one of several joint-tenants may lease his share to another of them (d).

And one joint-tenant may grant to a stranger for life, with remainder to his companion in fee (e).

Joint-tenants are said to be seised *per my et per tout*. They are in under the same feudal contract or investiture. Hence livery of seisin from one to another is not sufficient.

For all the purposes of alienation, each is seised of, and has, a power of alienation over that share only which is his aliquot part; and joint-tenants, as to property held in joint-tenancy, necessarily have equal shares.

Blackstone (f) has very elegantly described the unities of interest, of title, of time, and of possession, which constitute a joint-tenancy at the common law.

If there be two joint-tenants, and one of them convey all, &c. or his part and share, &c. the conveyance will operate only on his own moiety; and even though the other joint-tenant should die in the lifetime of the conveying party, the conveyance will not pass more than a moiety; and even though a bargain and sale be made of the entirety, by one of two joint-tenants; and the other joint-tenant die after the execution, but before the enrolment of the bargain and sale, no more than a moiety will pass (g).

In both these instances the joint-tenancy is severed by the conveyance, so that the share of the other joint-tenant will, on his death, devolve to his representatives; or, in the instance of a lease to two for their lives, to the tenant in reversion or remainder.

In section 301, *Littleton* seems to have fallen into an error on this point.

But though if a lease for years be made so that the joint-tenancy is neither severed nor suspended, the lease, notwithstanding it import to be of the entirety, will not pass more than a moiety, even if

(c) 1 Inst. 185 a. (d) 1 Inst. 192 a. (e) 1 Inst. 192 b. (f) 2d vol. 180.  
(g) 1 Inst. 186 a; *Preston's Shep. Touch. ch. Bargain and Sale*.

the lessor should eventually become seized of the entirety by re-lease, or by survivorship.

One case peculiar to joint-tenancy should be noticed in this place: When two or more persons are joint-tenants for their lives, either by express limitation, or by construction of law; and though the grant be in express terms to them and the survivor (h), and one of them convey his share so as to sever the joint-tenancy, the interest will be abridged, and the share of each tenant, when held in *severalty*, will continue only during his life. *Expressio eorum quæ tacite insunt nihil operatur*, is the maxim, and renders the limitation to the survivor as a part of the gift, \*of no avail. Cross limita- [\*64] tions by way of remainder guard against this result.

Also, if two or more joint-tenants make a conveyance by their concurrence of all their estate, or a lease for years, the estates so conveyed or leased will, if the joint-tenancy continue, be determinable only with the death of the surviving joint-tenant; and even if one of several tenants for life lease for years, and die, this lease of his moiety will be binding on the survivor, and continue during his life, if the term of years should so long continue; but any rent reserved by such lease would, in this event, cease, and not belong to the surviving joint-tenant (i).

But if one of several joint-tenants for life should lease, and afterwards sever the joint-tenancy, and then die (k), no decision has been found which fixes the duration of the lease. The question to be raised on this case is, whether the lease shall determine with the death of the lessor, or shall continue during the life of the other joint-tenant. In its creation it had a capability of continuing during the whole period of the years, if the lives, or either of them, should so long live. But it may be objected, that, in point of law, the lessee has an estate for years, to endure so long only as the estate of the lessor shall continue, so that the lessee's interest will determine at whatever period the \*estate of his lessor shall deter- [\*65] mine according to the boundary prescribed to it by law.

This appears to be the better opinion.

But when several persons are joint-tenants for their lives, and one of them leases to a stranger for years, and then releases to the other joint-tenants, these joint-tenants will hold, subject to the lease, as long as their estate shall continue; and the term of years will not determine on the death of the lessor, for the leasees, while they hold, will hold under a title, which is subject to and charged with this lease (l).

Although a re-lease is the proper assurance between joint-tenants, yet to a stranger a joint-tenant, or one of several joint-tenants, must convey by feoffment, fine, common recovery, lease and re-lease, bargain and sale, or lease, in like manner and under the same circumstances, as he must have conveyed his share, if he had been solely seized, or had been a tenant in common.

(h) 1 Inst. 191 a. (i) *Eustace's case*, Jones, 55; 3 Salk. 204. (k) 1 Salk. 204.  
(l) Wing. Max. 51; Lord *Abergavenny's case*, 6 Rep. 79.

It has been already observed, that a mere charge will not bind the survivor, taking in right of survivorship, on the death of the person by whom the charge is created. But if the joint-tenant alien, then such charge will be good against his assignee ; and if he become the survivor, such charge will bind him and his heir to the extent of the share which he had at the time of the charge ; and judgments, statutes \*staple, recognizances, crown debts, and the like encumbrances, may attach on the share as increased by survivorship.

And although the charge of a joint-tenant will not bind the survivor as such, yet if one of two joint-tenants accept a release from the other, he will hold, in point of estate, under their grantor ; yet the re-leasee shall be bound by judgments, and the like charges of the re-leasor ; for to this purpose the title of the re-leasor has continuance (m).

But if the re-leasor die before execution on the judgment, and in the life-time of the other, yet the re-leasee shall hold the re-leased moiety discharged of any execution (n).

So if one of two joint-tenants in fee grant a rent in fee, and afterwards re-lease to his companion, the re-leasee will of consequence be in under the estate of the original grantor, and no degree or conveyance be made as between the re-leasor and re-leasee ; yet the title of the re-leasee is so far under the re-leasing joint-tenant, that the survivor shall not, even after the death of the re-leasing joint-tenant, hold discharged from the rent (o).

This class of cases is referred by Wingate (p), to the Maxim *qui prior est tempore, potior est jure*.

A joint-tenant has not any devisable estate ; and even if a [\*67] joint-tenant make his will while \*he is joint-tenant, and afterwards become solely seised by survivorship or by release, his will, unless re-published after he becomes solely seised, will be inoperative (q).

Whether a contract by one of several joint-tenants may be specifically enforced in chancery against the surviving joint-tenant, is a point on which the books are not agreed.

In the more recent cases the *dicta* have been in favour of an equitable severance of the joint-tenancy by the contract. There are strong grounds for contending that the person claiming under the contract has not any equity which he can make available against the surviving joint-tenant.

Though at the common law joint-tenants must be capable of taking at one and the same time, yet under the learning of uses and executory devises persons may be joint-tenants who take at different times ; thus, under a devise, or limitation to the use of the children of A, the estate may vest altogether in one ; afterwards, when a second child is born, then in two ; and afterwards, on the birth of

(m) Lord Abergavenny's case, 6 Rep. 78 b. (n) Ibid. 79 a. (o) Ibid. (p) p. 150. (q) 1 Inst. 185 b ; Swift dem. Neale v. Roberts, 3 Burr. 1438.

a third child, in the three ; and so on progressively as the children are born.

And when the gift operates by springing use, or executory devise, the rights of the unborn children to their shares cannot be defeated or prejudiced.

But when the gift to the children is by way \*of remainder, [\*68] the case is so far governed by the rules of the common law, that no child can take a share unless he be born, or come *in esse* (*en ventre sa mere*) before the determination of the prior particular estates by which the remainders are supported (r).

And to merge, surrender, or destroy the particular estate, so as to deprive it of all support, as a remainder depending on a particular estate, is, it should seem, to defeat the right of after-born children.

Some qualifications must be added to this proposition.

For should the remainders be turned into a right of entry, and that right should not be asserted until the birth of other children, no well-founded objection seems to exist against the right of the after-born children, to enter jointly with the other children.

On this point no decision has been found.

These are a few only of the leading points belonging to the learning of joint-tenancy.

### *Coparceners.*

COPARCENERS are several persons taking lands, or any undivided share of lands, held for an estate of inheritance by descent. They may have equal or unequal shares. For instance, two daughters, or two sisters, taking as co-heirs, will have equal shares.

\*But a daughter, and two grand-daughters taking in right \*[\*69] of a deceased daughter, will have unequal shares ; i. e. the daughter will have one moiety, and the two grand-daughters the other moiety between them. So heirs in different degrees, and on different descents, from heir to heir, are parceners, until there be a severance of title, by the change of the title by parcenary into a tenancy in common by alienation (s). But whether the co-heirs take equal or unequal shares, each has a power of alienation by deed or will over her own share.

But as between themselves co-heirs have a joint seisin ; and the rule of law is, that the several persons being *co-heirs* do, for many purposes, *make only one heir* (t). For this reason they may either *re-lease*, or by feoffment, or any assurance, convey to each other.

Notwithstanding they have a joint seisin for some purposes, yet on the death of each of them, the share of which she was actually seised will descend to her heir at law ; and (except in the case of estates-tail) a more remote descendant may be preferred to the

(r) *Mogg v. Mogg*, 1 Marivale, 654 ; but see *Jenk.* 828, pl. 52.

(s) *Litt. sec.* 315 ; 1 *Inst.* 196 a.

(t) 1 *Inst.* 165 b. 164 a. 196 b.

other co-heirs, on the ground that the more immediate descendants are of the half blood to the person last seised.

For example : *A*, seised in fee-simple, dies, leaving two daughters, *B* and *C*, who are of the half-blood to each other, since each daughter was by a different wife. They enter, and are [\*70] \*seised ; *B* dies without issue ; the uncle, or other collateral heir of *B*, will be entitled as her heir of the whole blood, in exclusion of the sister and her descendants, since *B* was the person last actually seised. But if *B* had died without having obtained an actual seisin, then *C* would have taken the entirety as the immediate heir to *A*, her father, the last person actually seised.

In general, and for most purposes, the *seisin of one coparcener is the seisin of the others* ; and the possession of one coparcener is considered as the possession of the other co-heirs, except in cases of actual ouster, &c.

[Hob. 120 ; Dyer, 128 ; *Reading v. Royston*, 3 Salk. 423 ; *Fairclain v. Shakleton*, 5 Burr. 2604 ; *Fisher et al. v. Prosser*, Cowp. 217 ; *Peaceable v. Read* and others, 1 East, 568.]

Coparceners are seised *per my et per tout*, yet each has a devisable interest ; and a fine with proclamations levied by a stranger may, when both coparceners are out of possession, bar one coparcener without barring the others ; since one, by reason of infancy, &c. may be, and the others may not be, protected from bar by non-claim.

A re-lease from one to the other does not make any degree in the title. The re-lessee will, it is apprehended, be in by descent, and not by purchase, so that his ancestor will be deemed the first purchaser. On principle, a re-lease by one, to one of several other parceners, or to some of them, does make a degree in the [\*71] title, \*and the re-lessee, or several re-lessees, will be the first purchaser or purchasers.

The law of coparceners involves the common-law learning of partition ; and this, Lord *Coke* observes, is a *cunning learning* ; and there is a great peculiarity in the law applicable to coparceners, partitions, &c.

If one coparcener grant a rent to another for owelty of partition, this rent will be good, though granted without deed, and will be descendible as from the original ancestor (u).

A distress may be taken for it of common right, without an express grant of a right to distrain (x). So a fee may exist in the rent without any words of grant to heirs.

So if two coparceners make partition by agreement, or by re-lease, the entirety of each, though in some degree a new acquisition, will be descendible in the same manner as the original share was descendible ; for instance, if *A* and *B* are coparceners, and they agree on partition and re-lease to each other ; and the farm *A* is allotted to *A* for her share, and the farm *B* to *B* for her share ;

(u) 1 Inst. 169. 177 b.

(x) 1 Inst. 169 ; 5 Rep. 7.

then, supposing them to be seised by descent *ex parte materna*, the farm *A* will be descendible from *A* as seised *ex parte materna*, without distinguishing the part received by the deceased upon the partition from the part to which the deceased was entitled before partition.

\*In short, mere partition, or a re-lease upon partition, [\*72] does not make any change in the seisin. This is evident from a variety of cases to be found in *Coke on Litt.* in the chapter *Parceners*, and *Parceners by Custom*.

Hence the rule, that mere partition will not produce the effect of revoking a will (*y*); and although the partition be made by a conveyance, or fine to the use of the respective heirs, they will be in *quasi by descent*, and not by purchase.

In this instance, the seisin is, in point of fact, and in point of law, changed; but the use partakes of the quality of the old seisin. It is rather strange, however, that the same rule which applies to settlements under similar circumstances had not been applied to partitions; for a conveyance by *A*, to the use of himself in fee, is a revocation of his will: and a conveyance on a partition to the use of the owner and his heirs, ought, in principle and consistency, to have received a like decision.

And it is agreed, that any modification of the uses by a power of appointment, &c. will produce the effect of revocation.

*Luther v. Kidby* is the leading case respecting partitions, as not producing the effect of a revocation.

That case is, beyond all doubt, law, as it applies to the original share; but it is not easy to comprehend how the accessional or acquired \*share could pass by a will made anterior to the [\*73] partition. The only legal ground for supporting the title must be, that there is the same seisin, but this cannot apply as between tenants in common; and yet the rule is, that a partition between tenants in common is no revocation.

In *Luther v. Kidby*, the devise was of a moiety; and the doubt on the certificate of the judges is whether the will operated upon the entirety. The original property of the party unquestionably remained subject to the dispositions of his will. The difficulty is to understand how the accessional or additional moiety could pass by the will, even upon general principles, and still more especially as the devise was of a moiety.

On this subject there are many pertinent observations by the present chancellor, in *Knollys v. Alcock*, 7 Ves. 558, from which it may be inferred to have been his opinion, that no more could pass by the will than was comprehended by the language of the will; for instance, a devise of a moiety of the farm called *A*, could not pass all or any part of the farm called *B*, though that farm was received on a partition.

Many other difficulties of the like nature will occur in examining

cases of this nature. The misfortune is, that the cases have carried the law beyond principle. They therefore baffle all learning [\*74] founded on technical reasoning. \*By anomalies, the best lawyer is most likely to be entrapped into error.

When decisions follow principle they form part of a system, and are remembered ; or rather the law is within the compass of the lawyer. Lord *Coke's* observations will readily occur, and should be in the recollection of judges, and protect the law from innovation by anomalies, and all departure from principle.

There is one instance of a right in parcenary changed into a joint-tenancy. It is, if two coparceners make a lease, reserving a rent, they shall have this rent in common as they shall have the reversion (viz. annexed to their estate in coparcenary). But if afterwards they grant the reversion, excepting the rent, they shall be from thenceforth joint-tenants of the rent (a). The maxim is *cessante causa cessat effectus*.

On the other hand, under a grant to two coparceners of a rent for owelty they will have the rent as parceners, and not as joint-tenants (b).

So if two coparceners alien in fee, rendering rent to them and their heirs, without any words of severance, they shall have the rent in course of coparcenary, and not as joint-tenants (c).

[\*75] \*These and the like cases are founded on the maxim, that things are construed according to that which was the cause thereof.

Though on a partition between coparceners there be an implied warranty, while the privity continues, yet when one of them aliens in fee, or even in tail, while the title is held under the entail, the warranty ceases, and consequently the title to the lands given to the other parceners on the partition need not be investigated.

Even the purchaser of the fee, or of an estate tail, will be discharged from the warranty, and consequently cannot be affected by it.

### *Tenants in Common.*

THIS tenancy may be created by deed or by will, or arise by prescription (d), or it may arise in consequence of a severance of a joint-tenancy (e), or the change of a title by coparcenary into a tenancy in common (f).

Tenants in common have several freeholds, while joint-tenants and coparceners have one freehold (g).

This tenancy may be by express gift, or by construction of law ; by construction of law, in the instance of a gift to two

(a) *Wingate's Maxims*, 19 ; *Finch*, 9.

(b) *Wingate's Maxims*, 21, pl. 11 ; *Windham's case*, 5 Rep. 8 a.

(c) *Wingate's Maxims*, 21, pl. 12 ; 1 Inst. 169 b ; but see 1 Inst. 12 b, and *Watk. Descents*, 290. (d) 1 Inst. 195 a. (e) *Litt.* § 294. (f) *Litt.* § 292.

(g) 1 Inst. 189 a ; 5 Rep. 7.



persons of a corody (*h*); or of a remainder to the right \*heirs of two persons who are living (*i*), not being husband [\*76] and wife (*k*), and who must therefore take vested interests at different times, namely, the right heirs of each person on his death; also of a gift to two persons who may not lawfully intermarry, and the heirs of their bodies (*l*); or a gift to three persons as to whose marriage there is no impediment, and the heirs of their bodies (*m*), to a body corporate, and to a natural person (*n*); or to two corporations (*o*); by express gift, as in the instance of a gift to two during their joint lives, and from and after the death of one of them, to them, to be equally divided between them, share and share alike, as tenants in common, and their respective heirs and assigns.

So there may, by proper words, be a tenancy in common of the freehold, and a joint-tenancy of the inheritance; thus,

Two persons may be joint-tenants of the freehold, and may have several inheritances in tail or in fee (*p*).

These tenants may have equal or unequal shares.

They may be also tenants in common as to part, and joint-tenants as to the residue of lands.

\*Each tenant in common, not being a tenant in tail, has [\*77] a devisable interest in his own share, or he may convey the same: he is to be considered as solely or severally seised of his share; he must convey the same by lease, or by lease and release, by feoffment, &c. even though he lease, &c. to his companion, [*Broke*, Feoffment *de Terre*] (*q*), exactly in the same manner, and under the same circumstances as he must have conveyed the entirety, if he had been solely seised of the entirety. However, he cannot convey more than his particular share. One tenant in common, as such, cannot re-lease to another tenant in common as such.

But when two or more persons are joint-tenants as to certain shares, a re-lease from one of them to the other of them will be proper as to those shares, and it will not be any objection that they are tenants in common of other shares.

If two tenants in common join in a lease, there is, in point of law, a distinct lease by each of them (*r*) of his particular share; and in pleading, the title must be stated accordingly (*s*).

So if two tenants in common, in fee, grant a rent-charge, there is, in point of law, a several and distinct grant, by each, of a rent out of his moiety or part (*ss*); and no language expressive of an intention to grant one rent will be effectual to that end.

They should \*join in conveying the fee to uses, and create [\*78] the rent by a declaration of use. In this mode there would be only one rent.

The possession of one tenant in common is *prima facie* the pos-

(*h*) 1 Inst. 190 a.

(*i*) *Windham's case*, 5 Rep. 7.

(*k*) *Roe v. Quartley*, 1 Term Rep. 630.

(*l*) Litt. § 296; 1 Inst. 189 b.

(*m*) 1 Inst. 25 b. 184 a.

(*n*) 1 Inst. 189 b; 190 a.

(*o*) Litt. § 296, (*p*) Litt. § 295.

(*q*) Pl. 45.

(*r*) 1 Inst. 45. 200.

(*s*) *Heatherly and Worthington v. Weston*, 2 Wils. 232.

(*ss*) 1 Inst. 197 a. 267 b; 5 Rep. 7.

session of the other tenants in common. It may, however, become adverse by actual ouster, or from a possession furnishing evidence of ouster (t).

In reference to titles derived through tenants by entireties, joint-tenants, coparceners, and tenants in common, care should be taken that the part-owners were, at the time of their respective executions of their conveyances, competent to convey the shares they professed to convey; and that the form of conveyance was adapted to the relative situation of the tenancy, and of the persons by whom and to whom the conveyance was made.

Indeed the learning of tenancy by entireties, joint-tenancy, coparcenary, and in common, is of such general occurrence, and so is the learning of cross-remainders as connected with tenancy in common, that they ought to receive a large portion of attention. Lord Coke, in the third part of his first Institutes, has given all the leading principles and general rules.

Gifts with cross-remainders are uniformly grounded on a tenancy in common.

The tenancy under gifts of this sort is of a peculiar nature.

Each owner has an estate in every part of the lands, or the [\*79] moiety, &c. \*which are settled. But each moiety or third part, &c. of each tenant is in a different degree as to the right of possession; so that, supposing estates in possession with remainders to occupy lines or degrees of ownership, and two persons to be tenants in tail, with cross-remainders between them, each would have a moiety in the first line or degree, and the other moiety in the second line or degree.

Again, suppose three to be tenants in tail, with cross-remainders between them in tail, each would have one third part in the first degree, another third part (being two distinct sixth parts,) in the second degree, and the remaining one third part (being two other sixth parts,) in the third degree, and so on, in like manner, on a subdivision into a greater number of shares.

This subject is fully considered, and its application to practice shown, in the Tract on Cross-Remainders, &c.; and the substance of this Tract will be introduced into the *Essay on the Quantity of Estates*, on the re-publication of that Essay.

#### *As to Tenants in Possession.*

PERSONS who have the possession may grant it; and it is material to distinguish between estates in possession, and estates in reversion or remainder, on account of the mode of assurance which may be adopted, or may, under different circumstances, be deemed effectual.

[\*80] \*Estates in reversion or remainder may pass by grant without livery; but estates in possession in corporeal here-

(t) *Doe v. Prosser*, Cowp. 217.

ditaments cannot, except in particular cases, pass by mere grant. There must be either livery of seisin, or some other ceremony which is equivalent, or a previous estate, to be enlarged by release; and in this sense a lease and re-lease are said to countervail a feoffment. So an estate in possession may pass by bargain and sale enrolled, covenant to stand seised to uses, or by fine, or fine and declaration of the uses of the same, or by common recovery and a declaration of the uses. In short, by any mode except by simple grant.

A term of years of lands in possession might, at the common law, have been created by *mere word* and entry; for till entry there was only an *interesse termini*, or being created, might have passed by mere word. An *interesse termini* to commence at a future day, or on an event, might have passed in like manner; even though the term was reversionary, and the possession was not in the lessee, but in a tenant; for if the possession had been in a disseisor, &c. there could not have been a valid lease without a previous entry to restore the seisin. Hence the practice of entering and sealing a lease on the land, or making escrows to be delivered on the land (u).

But the reversion necessarily including the services could not be transferred, even for a term of years, without a grant by deed.

\*Terms of years of lands in possession may be trans- [\*81]  
ferred or surrendered without deed.

But it is apprehended that even a term of years, which confers a title to a reversion or remainder, cannot be transferred or surrendered without deed.

This point is more clear when there is, as between the termor and his reversioner, a reversion, than when the termor has a reversion merely in respect of having created an under-lease.

The point was in some degree discussed in *Harker v. Birkbeck* (u); *Beck v. Phillips* (uu), but it is very difficult to draw any satisfactory conclusion from those cases.

The general rule is, that all things lying in grant, from the nature of the thing or subject, as rents, commons, &c. or from the nature of the estate or interest therein, as reversions and remainders, cannot be granted or surrendered without deed.

Lord Coke observes (x), of freeholds and inheritances, some be corporeal, as houses, &c. lands, &c. these are to pass by livery of seisin, by deed, or without deed; some be incorporeal, as advowsons, rents, commons, estovers, &c. These cannot pass without deed, but [add, may pass] without any livery. And the law hath provided the deed in place or stead of the livery. And so it is if a man make a lease, and \*by deed grant the rever- [\*82]  
sion in fee; here the freehold with attornment of the lessee by the deed doth pass, which is in lieu of the livery. See Bract.

(ll) 1 Inst. 48 b. (u) 3 Burr. 1556. (uu) 5 Burr. 2627. (x) 1 Inst. 49 a.

lib. 2, c. 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuita translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quod res incorporales non patiuntur traditione, sicut ipsum jus quod rei, sive corpore inhæret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.* He adds,

This ancient manner of conveyance by feoffment and livery of seisin doth for many respects exceed all other conveyances. For (as hath been said) if the feoffor be out of possession, [read dis-seised] neither fine, recovery, indenture of bargain and sale enrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffee, and make a perfect tenant of the freehold, but only livery of seisin upon the land; the other conveyances being made off from the ground, do sometimes more hurt than good, when the feoffor is out of possession [read dis-seised]; and yet in some cases a freehold shall pass by the common law, without livery of seisin; as if a house or land belong to an office by the grant of the office by deed, the house or land passeth as belonging thereunto. So if a house or chamber belong [\*83] to a corodie, by the grant of \*a corodie, the house or chamber passeth. A freehold may by custom be surrendered without livery, as hereafter shall be said; and so of assignment of dower, *ad ostium ecclesiæ*, or otherwise; and by exchange a freehold may pass without livery.

### *As to Tenants of Estates in Reversion.*

THIS is the estate retained by a grantor of a particular estate, or by the settler, who, after limiting several particular estates by way of use, limits the ultimate fee to himself, or the same results to him by operation of law.

In a common-law gift, if he limit the fee in contingency he will have the possibility of reversion. *Fearne* doubts this conclusion.

So if the testator create several particular estates, and the ultimate fee is limited to or to the use of his right heirs, this is a reversion, and descends to the heir. The authorities are collected in *Guillim's Bacon*, ch. Remainder.

But a devise to trustees in trust for the heir or heirs at law of *B*, and the heirs, executors, &c. of such heir or heirs, though the heir at law answer the description, is not the old reversion but a new gift, making the heir a purchaser (y). But if the use of the fee be limited in contingency, the fee will result to the grantor till [\*84] it can vest; and if the fee be devised in \*contingency, that fee will descend to the heir at law, unless it be disposed of, as it may be by some residuary clause, or by some special disposition.

The ultimate interest taken under a conveyance to uses is not, strictly speaking, a reversion according to the rules of the common

law. It is an interest in the nature, and partaking of all the qualities, of a reversion. Whether this reversion remain in the lessor or settler, or the heir at law of a testator; or is aliened by the owner, either for the entire estate, or for a portion of it; or whether it be a residue of a particular estate; it retains its denomination of a reversion; so that there may be a reversion for years, for life, or in fee; and the estate, which is a reversion as to one person, may be a particular estate as to another person: for example: *A* leases to *B* for life, and grants the reversion to *C* for years; as between *B* and *C*, *C* has a reversion; but as between *A* and *C*, *C* has a particular estate.

And an estate in reversion may lose its denomination and peculiar qualities by becoming an estate in possession; and it may become an estate in possession by the surrender, merger, forfeiture, or actual determination of the prior estate.

The material circumstance to be regarded as to estates in reversion, is, that they cannot be granted or surrendered by mere writing. *Sheppard's Touch.* chap. Surrender.

\*But there may be a surrender of an estate in reversion [\*85] by mere implication of law, as by accepting another estate incompatible with the estate surrendered.

It follows from the observations which have been made, that an estate in reversion may pass by mere grant. The contrary is supposed to have been asserted by Mr. *Fearne*, in his Reading on the Statute of Enrolments; but it is difficult to account for that great lawyer's having fallen into this mistake, if made by him.

Though a grant would be an effectual mode of assurance to pass an estate in reversion, a lease and re-lease, and bargain and sale enrolled, are more generally used in practice. They are entitled to preference from the circumstance, that they are in themselves complete evidence of title, while a mere grant, at least without a recital of the existence of the prior estate, must be supported by extraneous evidence, to show that a prior estate existed; so that there was a reversion divided from the possession.

### *As to Tenants of Estates in Remainder.*

THE observations which have been made respecting the mode of alienation of estates in reversion are, *mutatis mutandis*, equally applicable to an estate in remainder, except that a remainder, instead of being part of the former \*ownership, is a portion [\*86] of estate granted at the same time with the prior or particular estate, and to take effect either absolutely, or eventually on the regular and proper determination of that estate.

A remainder is a residue of an estate in land, depending upon a particular estate, and created together with it (z).

It is also observable, that an estate, which is a remainder as to one

(z) 1 Inst. 49 a.

person, may be a reversion as to another person ; as, if *A* lease to *B* for life, and afterwards grant the reversion to *C* for life, remainder to *D* in fee ; as between *C* and *D*, *D* has a remainder ; but as between himself and *B* he has a remote reversion.

In one circumstance also there is a difference between a remainder and a reversion ; a reversion always carries with it the actual or supposed fruits of seigniorship ; but a remainder, as such, gives no right to these fruits.

By reason of this difference, if an estate be granted to *A* in tail, remainder to *B* in fee, and *B* grant to *A* for an estate-tail of the same extent as the former estate-tail, the grant will not have any effect (a). While, if the reversion had continued in the grantor, and he or any person claiming under him had granted or devised [\*87] to *A* in tail, this grant or devise, \*though giving an estate of the same duration, would have been good.

In the former instance the gift was nugatory, because it could not have any effect. The rule is *quod semel meum est amplius meum esse non potest* (b). In the latter instance the gift is valid, since it will have the effect of passing the seigniorship during the estate-tail.

And if two estates of the same duration are granted, and the latter is granted out of the reversion, it seems to follow, that the grant will be good ; but if a person having a remainder grant an estate which is commensurate only with the time of an estate previously granted, such grant would be nugatory. Thus if *A* grant to *B* for life, remainder to *C* in fee, and *C* grants to *D* for the life of *B*, it should, from the distinction taken in *Badger* and *Lloyd*, seem that the latter grant would be void. But *quære*: for it is the common practice in settlements and wills, by way of strict entail, to limit an estate to *A* during his life, with remainder to *B* for the life of *A* ; and such remainder is allowed to be good on account of the possibility that the estate of *A* may determine in his life-time ; and consequently the estate of *B* may take effect in possession during the life of *A* (c).

[\*88] To these observations it may be added, that \*a remainder or reversion may pass by that name, as, all that remainder, or all that reversion of and in, &c. or a remainder may pass by the name of a reversion, or *è converso* (d).

And a remainder or reversion may pass by a grant of the land itself ; and it is always more eligible, except in particular cases, as where there are several estates in the same person, and the estate in reversion or remainder is to be granted, reserving the particular estate, to grant the land rather than the reversion or remainder ; and even if the reversion or remainder is to be granted, *eo nomine*, it is the more eligible mode to grant it by as simple a description as may be ; as, all that the remainder or reversion for life ; or, all that the remainder or reversion in fee of the said . . . of and in all, &c.

(a) *Badger v. Lloyd*, Salk. 232 ; and Lord Raym. 523 ; *Pool v. Nedham*, Yelv. 148.

(b) 1 Inst. 49.

(c) *Duncomb v. Duncomb*, 3 Lev. 437.

(d) 1 Inst. 299 b.

describing the parcels fully, or by reference, as the case may require.

It, however, more generally happens that a remainder or reversion granted *eo nomine* is granted in terms of more minute description, showing its relative situation, and the manner in which it is expectant, &c.

In these and the like cases care should be taken that the description be correct; for any material error in the description will be fatal; for then, in point of law, there will not be any such remainder or reversion; and as such remainder or reversion is the subject and \*essence of the grant, the grant will fail for want [\*89] of a subject on which it may operate.

Cases of this sort require particular attention, and it is incumbent on the conveyancer to satisfy himself that the description is true, in point of fact, and in law. When a person has several distinct estates, he may grant *one estate* by proper words, and retain the other estates (e).

Where the particular estate and remainder depend upon one title, the defeating of the particular estate is a defeating of the remainder (f).

But where the particular estate is defeasible, and the remainder by good title, there, though the particular estate be defeated, the remainder is good (g).

Hence a condition annexed to a particular estate is defeated by a limitation over (h).

And in wills, and in conveyances to uses, the remainder may take effect, though the estate for life should never vest.

A remainder of lands in possession may be created without deed, by reason of the livery (i).

But a remainder, when it is in that state, cannot, under the rules of the common law, be transferred without deed.

The particular estate and the remainder, \*for many purposes, make together the component parts of one estate. [\*90]

The rules, as they apply to particular estates and remainders, are,

1st. There cannot, at the common law, be a remainder without a prior particular estate (k).

2dly. The particular estate may be for years, for life, or in tail.

3dly. If a remainder be limited in contingency, there must be a prior vested particular estate of freehold to support the remainder; for the freehold cannot be granted to commence *in futuro*; but notwithstanding the particular estate be suspended in the same instant in which it is created, still the remainder will be good (l).

4thly. The remainder must be so limited as to commence either absolutely or contingently, on the regular determination of the particular estate, without any interval, even of a day, between the particular estate and the remainder (m).

(e) 1 Inst. 319 a. (f) 1 Inst. 298 a. (g) Ibid. (h) Dr. Butts's case, 9 Rep. (i) Litt. § 80; 1 Inst. 49 a. 143 a. (k) 1 Inst. 298 a. (l) 1 Inst. 298; Dyer, 140 b. contra. (m) Plow. 23; Raym. 144; Gwil. Bac. Abr. Remainder, 758.

5thly. A remainder expectant on an estate tail may be limited after an indefinite failure of the issue inheritable to the estate-tail.

6thly. No estate in remainder can be limited after, and expectant on, a fee (n).

One fee, however, may, even at the common law, and by [\*91] way of remainder, be limited in the \*alternative, as a substitution for another fee, if that fee should fail of effect (o).

7thly. No estate limited by way of remainder can, as a remainder, be so limited as to derogate from, *abridge*, or *defeat*, any prior estate.

An interest so limited must, if good, operate either by way of executory devise, or springing use.

The particular estate must, in a deed operating by the rules of the common law, give a vested interest, even though it be a term of years, otherwise the remainder will be void as a freehold *in futuro*, though the particular estate, as being for years, may be good.

But in a will, or conveyance to uses, the particular estate may commence by way of executory devise or springing use; but the moment the particular estate of freehold vests, the limitation over by way of remainder becomes subject to the rules which attach to remainders.

Though the first estate be for years, and does not require livery of seisin to its perfection, yet livery of seisin must be made to the termor, that its benefit may be communicated to the remainder (p).

8thly. A remainder expectant on an estate of freehold may be limited to a person not *in esse*, or not ascertained, or to a corporation, while that corporation is incapable of taking, because it is without its head (q).

[\*92] \*This subject will be more fully discussed in considering the nature of contingent remainders.

### *Of Titles under Tenants of Vested Estates.*

TENANTS who have vested estates are those persons who have actual estates, either in possession, reversion, or remainder; and these estates may be transferred from person to person, by the rules of the common law, and in all cases, except such alienation be restrained by the positive enactments of the statute-law. Such interests are also devisable, either under the owners of contingent remainders, or other contingent interests.

Strictly speaking, there cannot be a contingent estate. There may be a contingent interest; but no interest, except such as is vested, is accurately termed an estate.

It is a general rule that the law favours the vesting of estates; for the law delights in vesting estates; and in the language of Lord

(n) *Nottingham v. Jennings*, 1 P. W. 28.

(p) Litt. § 60; 1 Inst. 49 a.

(o) *Doe v. Burnell*, 6 Term Rep. 30.

(q) 1 Inst. 264 a.



*Coke* (r), contingences are odious in the law, and are the causes of troubles, whereas the vesting of them is the cause of repose and certainty.

And no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested.

But these rules have their limits, and their exceptions.

\*A clear and express intention will prevail (s). [\*93]

An estate will never vest contrary to the intention, when that intention is expressed, or is the result of the context of the deed or will; except there be a rule of law, as in the instance of the rule in *Shelley's case*, which, for reasons of tenure or policy, counteracts and defeats the intention (t).

Every contingent interest of freehold, limited by way of remainder, may be destroyed by the surrender, merger, forfeiture, determination, or destruction of each particular estate by which it is supported, or by the conversion of each particular estate into a right of action.

A contingent interest may also be re-leased by the owner; and contingent interests are devisable, and may be bound in equity by a sale for a valuable consideration, and may be bound at law by estoppel. They may also be extinguished by feoffment, fine, or common recovery.

A contingent interest does not enable the owner to transfer the estate by any conveyance to take effect in his life-time, under the rules of the common law. Contingent interests, however, of the equitable ownership, and even of the legal ownership, are assignable in equity.

In a court of equity, a contract is in effect an alienation, and will in that court be enforced.

\*So if the remainder was contingent from any cause, that [\*94] remainder may be transferred in equity, subject only to the contingency, exactly in the same manner as if it were a vested estate.

It appeared proper to notice these differences to prevent an indiscriminate practice of applying the same rules to equitable, which are proper to be applied to legal, interests only.

In cases of this sort the decision in *Vick v. Edwards* (u) will occur to the lawyer, and will involve those not thoroughly versed in the principles of the law, in some embarrassment.

Whether the fee was vested or contingent is a question foreign to the present inquiry. But supposing it to have been contingent, (and it was contingent unless the trusts for sale can be considered as distinguishing this case, from ordinary cases) (x); then a considerable portion of Lord *Talbot's* observations in *Vick v. Edwards* is questionable.

(r) 2 Bulstr. 131.

(s) *Deakin v. Phillips*, 1 Maule & Selwyn, 744.

(t) Succinct view of the rule in *Shelley's case*.

(u) 3 P. Wms. 372.

(x) *Ex parte Harrison*, 3 Anstr. 836.

In cases of this sort, except the nature of the trusts, or the context of the will, proves the estate to be vested, the better opinion is, that the inheritance is in contingency (y); and that while in contingency it cannot be conveyed. To complete the title, the concurrence of the grantor or his heirs, or the heirs of the testator, or in \*some cases his residuary devisee, is necessary; and a fine, importing to pass the fee, so far from having the effect to transfer the contingent fee, will extinguish all title under the same.

Interests of this sort are called possibilities coupled with an interest, and are distinguished from mere rights or titles of entry. Contingent interests are devisable; rights or titles are not devisable; but they may be re-leased or extinguished.

A gift to the survivor of several persons, or a gift to persons not ascertainable, as children who may attain twenty-one, is a mere possibility. This possibility cannot be re-leased; it may be bound at law by estoppel, in equity by contract. An expectant heir has a possibility. The contract of an expectant heir, though it will bind him, will not bind the succeeding heir (z).

An *interesse termini* is a future interest, and not an estate. Such interest, unless it be contingent, may be assigned or transferred. Whether a contingent interest in a term can be assigned, is a point for which no authority is found.

The decisions in the cases of *Matthew Manning* (a) and *Lampet* (b), merely establish that a possibility, coupled with an interest, [\*96] is not \*assignable, though it be re-leasable. But each of these cases turns on the peculiarity, that all the estate was in the legatee for life, and no estate in the person who was to take under the limitation over.

That a contingent interest may be devised is established by *Roe v. Jones* (c).

But, that a possibility may be devised, the interest must be such as is in its nature devisable. For instance, the owner must be entitled to an estate in fee, or *per autre vie*, and not merely an estate-tail in the lands; and it must be to a person ascertained, and not to the survivor of several persons, or to persons who are to answer a given description (d); and it should seem that no interest is devisable except it would be releasable; and that a gift to the survivor of several persons; or to such children of A as should be living at his death, or the like; does not confer an interest which may be devised, while it remains in its executory state, because the objects are unascertained; thus, a gift by one or two persons before he is the survivor, would not be good, although he afterwards became the survivor (e); or a gift by one of the children, in the life-time of

(y) *Ex parte Harrison*, 3 Anstr. 836.

(b) 10 Rep. 48.

(c) 1 Hen Blackstone, 38.

(e) *Doe v. Tomkinson*, 2 Maule & Selwyn, 165.

(z) 1 Anstr. 11.

(a) 8 Rep. 187.

(d) 2 Maule & Selwyn, 165.

*A*, would not be good, although such child should eventually be living at the death of *A*.

\*It is agreed, however, and even settled, that this interest [\*97] may be bound, or even barred by estoppel (*f*).

In cases of this description, fines, or recoveries, to operate by way of estoppel, should be adopted, instead of relying on mere re-leases by deed, except so far as the interest may be equitable, and consequently be bound by the re-lease, operating as a contract.

That contingent interests may be bound by estoppel is a conclusion to be drawn from *Weale v. Lower* (*f*). Such estoppel to pass an interest must be for years only; for if a feoffment should be made, or fine levied of the fee, by a person who has a contingent interest in fee, the interest itself would be extinguished (*g*). The learning of estoppel will be considered under a future division.

And a feoffment or fine by a person who has a contingent interest at law would extinguish such contingent interest, though the feoffment should be made, or fine levied, to a *stranger* (*h*).

When there is a contingent interest in tail, then, to bind such interest as against the issue in tail, there must be a fine with proclamations to operate under the statute s of Hen. VII. and Hen. VIII. However, it is suggested, as a proposition consistent with the principles of law, \*that a donee of a contingent remainder in tail might preclude the issue, by estopping himself from taking a vested interest. [\*98]

A common recovery, suffered by a person who has a contingent interest in tail, will not have any effect to bar the issue in tail, or those in remainder or reversion; but it will bind the party himself by estoppel; and perhaps may prevent the vesting of the contingent interest. And if a person who has a contingent interest in fee be vouched in a common recovery, this voucher will operate as a re-lease or extinguishment of his contingent interest (*i*).

But although contingent interests may be bound in equity by contract, yet for the purpose of completing the legal title there must be a conveyance of the estate when vested; or there must be a re-lease to persons capable of such re-lease.

There is also a difference between contingent interests of the legal, and contingent interests of the equitable, ownership.

Contingent interests of the legal ownership cannot be transferred. On the contrary, a fine levied to a stranger, and purporting to pass the fee, will extinguish the contingent interest. But a contingent interest of an equitable ownership may be transferred. Thus, under a grant or devise to two, and the *survivor* of them, and his heirs, the fee will, generally speaking, be in contingency; and it cannot be \*transferred at law if it be of a legal ownership; [\*99]

(*f*) *Weale v. Lower*, Pollexf. 57; *Moore*, 554.

(*g*) *Buckler's case*, 2 Rep. 55, and *Moore's case*, *Palmer*, 365; *Goodright dem. Burton v. Forrester*, 1 Taunton, 578.

(*h*) *Moore*, 554; 2 Rep. 55; *Hob.* 258; 1 Vol. of *Preston's Practice of Conveyancing*, 210; 2 *Ib.* 136.

(*i*) *Pells & Brown*, *Cro. Jac.* 580.

and therefore it is highly imprudent in 'this case' to levy a fine importing to pass the fee; and if a conveyance be made by lease and re-lease, its operation will be to pass the estate for life. At law it will not have any effect to pass the contingent interest. But in equity the lease and re-lease will give to the purchaser, if he be a purchaser for a valuable consideration, a right to call for a conveyance of the legal estate when vested; or a re-lease of it, as far as the intended vendor can make such release with effect.

But if the equitable ownership be granted or devised to *A* and *B*, and the survivor of them, and his heirs, in this case also the fee is in contingency, but as it certainly must vest in one of these persons, a sale by them will give a complete title to the equitable fee; and for this reason, as against all other persons, they may be considered as having the complete power of alienation over the equitable inheritance.

It is also to be observed, that when the remainder is placed in contingency by will, the reversion in fee may pass by words in a residuary or specific clause (*k*); and for want of such disposition the fee will descend to the heir at law (*l*); thus *A* and *B*, [\*100] and the heir \*at law, may pass their estates for life and in fee; and the contingent fee to the survivor of *A* and *B* may be destroyed by the union and consolidation of the freehold with the fee.

Also in conveyances to uses, when the ultimate fee of the use is limited in contingency, the fee will result to the grantor or settler (*m*); and of course a conveyance by *A* and *B*, and the grantor, would cause a destruction of the contingent remainder to the survivor of *A* and *B*; and unless there be some other particular estate by which the contingent remainder might be supported, a feoffment, fine, or recovery, by *A* and *B*, would bar the contingent interest (*m a*).

A fine or recovery by one of them would preclude all possibility of him or of his heirs taking even eventually, though he should be the survivor; but, except so far as the remainder could be destroyed as a contingent remainder, for want of the support of a particular estate of freehold, the interest of the other person to be benefited by survivorship would not be affected by the fine or recovery (*m b*).

When a grant is by a conveyance at the common [\*101] law to two, and the survivor and his \*heirs, or the remainder in fee is by any other means placed in contingency, the language of the books of the most esteemed authority leads to the conclusion that the fee passes out of the grantor, and does not immediately vest in the grantee. The inheritance is said to be in *abeyance*, or expectancy, or figuratively, in *nubibus*, or in *gremio legis*; hence the distinction in the common law, and so often oc-

(*k*) *Rogers v. Gibson*, 1 Ves. 492; *Stephens v. Stephens*, C. T. Talb. 226.

(*l*) *Plunket v. Holmes*, Baym. 28; *Parfey v. Rogers*, 2 Saund. 380.

(*m*) *Fenwick v. Milford*, 1 Leo. 162.

(*m a*) *Earl Bedford's case*, Poph. 3.

(*m b*) *Weale v. Lower*, Pollexf. 57; *Buckler's case*, 2 Rep. 55; *Vick v. Edwards*, 3 P. W. 372.

curing in the books, that the inheritance may be, and that the freehold (more aptly the immediate freehold) cannot be in *abeyance*. Hence, also, the rule, that there must be a vested estate of freehold to support a contingent remainder, whether the remainder be in a deed of feoffment, or of grant (n).

The doctrine of the abeyance of the inheritance, so far as it denies that the inheritance remains in the grantor, as an estate, is combated with great force by Mr. *Fearne*, in his *Essay on Contingent Remainders* (o). His argument is built on natural reason, and not on authority; for the cases of resulting use, or of the descent of the fee, when the fee is given in a will by words of contingency, are admitted to be exceptions to the rules of the common law; and not founded on the rules of that law; and it is rather singular, that a gentleman who had contended so strenuously, and so successfully, in favour of \*the technical rule under the doc- [\*102] trine in *Shelley's* case, should have become so strong an advocate, in the case under examination, for urging good sense and natural reason in opposition to the authorities founded on technical rules.

The strong point in Mr. *Fearne's* argument is, that when the contingent remainder in fee is destroyed, or fails of effect, the right of the reversioner will be in complete force; but this point, though readily conceded, does not establish his theory. It is quite consistent with the system of tenures, that when the contingent remainder has failed, the former owner should have, in full right, and as a vested estate, that which was intended for the person to whom the contingent remainder was limited. It is also consistent with the rules of tenure, that a tenant for life should not, with impunity, commit a forfeiture, and destroy the contingent remainders; and there is nothing in the nature of the grant, or in the intention of the parties, which precludes the former owner from entering, when all the estates limited by the grant are determined by forfeiture, or by any other means.

In the admission that there is such a species of interest remaining in the grantor as will become an estate on the determination of the prior estates before the contingent remainder can vest (p), so that the donor shall have the land again when it is ascertained that the right \*heirs of *H* can never take the con- [\*103] tingent fee limited to them, there is nothing at variance with the doctrine that the grantor has a mere possibility of reverter, as distinguished from an estate in reversion (q).

The rule is assumed to be, that while a contingent remainder in fee is capable of effect the grantor has a mere *possibility of reverter*. The moment the remainder fails, either by destruction, forfeiture, or other accident, the grantor has an actual estate.

Supposing a grant to be to *A* for life, remainder to *B* in tail,

(n) *Preston's Essay on Estates*, chap. Freehold.

(o) 1st Vol. 235.

(p) 1 *Fearne*, 236.

(q) *Jenk. Cent.* 248.

with remainder in fee in contingency, it is perfectly consistent that the grantor should have merely a possibility of reverter, while the contingent fee is capable of vesting, and that he should have an actual estate as soon as this contingent interest fails of effect. It is also a maxim of law that no man shall take advantage of his own wrong. From this principle it flows, that when the tenant for life destroys the contingent remainders, the person who has the possibility of reverter shall be entitled to enter by reason of that possibility, which is now become an immediate and present right of entry; an estate; by the destruction of those interests which alone excluded the grantor from more than a mere possibility. It is difficult to find a single authority, or a single expression, in [\*104] the books, which will support the \*opinion advanced by Mr. *Fearne*. On the contrary, the system of tenures almost imperiously required, that when a man had made a feoffment the whole fee should pass out of him (r), although the ultimate inheritance was limited in contingency. Against the authority of the books, which contain the learning respecting the abeyance of the inheritance, it will be necessary for those who support Mr. *Fearne's* doctrine to show that a conveyance by the donor or his heirs, while a particular estate is continuing, and while the remainder is in contingency, would be a valid grant, whether the same was a grant of a rent-charge, or a grant of an estate of freehold. The case must be put, simply and nakedly, of a grant to operate by way of conveyance, and not by way of estoppel. The interest must have remained in the former owner on a grant at the common law, as distinguished from a conveyance to uses, and from a disposition by will.

It may be said, the books treat only of the situation of the person to take the contingent remainder; and that the power of alienation is denied to a person so circumstanced; but it is impossible to read Lord *Coke's* Commentary on abeyance, or to read the observations in *Plowd. Com.* without feeling that the observations are applicable to the want of a power of alienation by the original donor, as well as by

[\*105] the person to whom the contingent remainder is \*limited.

Besides, the doctrine of the law, on the operation of feoffments; the rules which require that every contingent remainder should be preceded by a vested estate of freehold, created by the same deed or instrument; and that the contingent remainder must either vest or fail of effect before the determination of the estates of freehold by which the remainder is preceded, are all founded on principles which assume that the inheritance is in contingency, as well against the donor, as against the person to whom the contingent remainder is limited. The doctrine also which requires that when a grant is to *A* for years, with remainder to *B* for life, with remainders over, the livery should be made to the termor for years, as the means of giving effect to the gift to the persons who are to

have the remainder, is part of the same principle, and illustrates its application. It proves that the learning is founded on technical reason; on the necessity that the seisin to supply the grant should pass immediately and instantly from the grantor. The rule also, which requires that the remainders should be so limited that they may vest in successive owners, and that no chasm should be left between the determination of one estate, and the time appointed for the commencement of another remainder, is part of the same system. Thus a gift to *A* for his life, and after the death of *A*, and one day to *B*, is an example of a remainder which will be void, because it cannot vest immediately on the determination

\*of the particular estate. The nature, the object, and the [\*106] principles of livery of seisin, admitting, however, of the exception of a grant for years, to be enlarged into a fee on a condition, also demand most imperiously, that while the estates limited by the grant are capable of effect, no part of the seisin should remain with the grantor. Hence the rule that a grant to commence from a future day is altogether void. Did the law depend entirely on natural reason and good sense, independent of the policy adapted to the state of tenures, a grant to *A* for life, to hold from Michaelmas-day next, would be deemed a good, and not a void, grant; and the mind would be satisfied of the justice of a decision by which it should be determined that the grantor should hold till the appointed day, or that he should retain the fee; and that on the appointed day the estate should vest in the grantee; but in conveyances at the common law, effect is denied to grants of this or the like nature; while such limitations in conveyances to uses and in wills are allowed to operate. These are excepted cases, and turn, as to uses, on grounds of equity; and as to wills, on the indulgence allowed by the doctrine of executory devises to testamentary dispositions. The more this point shall be examined, the more clearly it will appear to be an acknowledged rule of the common law, that after the grant of a contingent remainder in fee, the grantor does not retain any estate whatever, but has merely a possibility \*of reverter, as distinguished from an actual re- [\*107] version.

The case which Mr. *Fearne* (rr) cites from *Broke's* Reading on the Statute of Limitations, p. 84, namely, "*A* makes a lease for life, on condition, that if the lessee has issue in his life the land shall remain to *W* in fee; and *A* recovers against the lessee by writ of waste, and has execution, the lessee has issue and dies, no action of *formedon* accrues to *W*, because the fee remained in *W* until lessee had issue, and then the recovery defeated the first limitation," may, if it be law, be accounted for on a consistent ground: *A* had a possibility of reverter till the waste; the waste was a forfeiture; the forfeiture was, in point of law, to *A*; and when he recovered, he was restored to his seisin, and defeated the estate of

*A* ; and, as a consequence, the remainder expectant on that estate, in the like manner, as if the forfeiture had been by a tortious alienation, &c.

Indeed the case of a grant in fee to a *corporation*, and the right of reverter to the grantor, on the dissolution of the corporation while seised, is an answer to the strongest point in Mr. *Fearne's* reasoning.

Contingent remainders are interests only, and not estates ; they will present themselves for consideration under the arrangement which treats of contingent interests.

[\*108] *\*As to Titles under Tenants of Cross-Remainders.*

THE nature of these remainders has been stated in a former page of this volume (s).

The first caution to be observed is, that cross-remainders are created.

When it is established as a fact, or as a conclusion of law, that cross-remainders are created, the title should be considered separately, as applying to the different farms, or the different parts of the same farm which are subject to the cross-remainders : For instance, if a farm called *A*, be devised to *A* in tail, and a farm called *B*, be devised to *B* in tail, and if either of them should die without issue of his body, then both the farms are devised to the other in tail or in fee, these are cross-remainders ; and the title to the farm *A* should be considered distinctly, as if it stood limited to *A* in tail, remainder to *B* in tail ; or, according to the fact, in fee ; and the title to the other farm should be considered exactly in the same manner as if it stood limited to *B* in tail, remainder to *A* in tail, or in fee.

So if an entire farm be limited to several persons in tail, with cross-remainders between them in tail, the title should be considered with a view to each *aliquot part* ; exactly in the same manner as if that part stood limited to *A* in tail, remainder to *B* in tail, [\*109] remainder \*to *C* in tail, &c. When the cross-remainders are numerous, the division will branch into a great number of heads (ss).

In short, this is the mode of analyzing titles which are complex in themselves. Such titles are by this mode of arrangement rendered simple.

In general the misfortune is the want of an accurate knowledge of the precise nature of these remainders, and of the ownership which exists under them. On this subject, the tracts on cross-remainders, and former observations in this volume, will afford the requisite information.

*In deeds*, except in reference to executory trusts, or marriage



articles, cross-remainders cannot arise without express words of gift, creating the cross-remainders.

In *wills*, cross-remainders may arise by implication.

The rules applicable to wills, are,

1st. Cross-remainders will, from general words, be implied as between two persons ;

Or, as between a class of persons, when the class may consist of one, two, or more persons, as the children of *A* ; or the children of *A* who shall attain 21, &c. &c. (1).

2dly. Cross-remainders as between three or more devisees will not be implied, unless there be some expression which leads to the conclusion, \*that the remainder-man is not to take [\*110] until all the devisees being tenants for life shall be dead ; or all the devisees being tenants in tail shall be dead without issue ; or that all the lands, &c. are to go over together, and not in parts.

The general rule of the common law is, that on a gift to two or more persons as tenants in common, for life, or in tail, the remainder or reversion will take effect in possession as to each share, when the particular estate in that share shall be determined.

The cases on this subject will be collected in the *Essay on the Quantity of Estates*, in the chap. on Estates Tail, and for Life ; or probably in a chapter to be appropriated to the subject of cross-remainders, and other cross-limitations.

In marriage articles, and executory trusts, for the benefit of children, or daughters, as a class of persons entitled to estates-tail, cross-remainders will arise by implication from the nature of the interest, and on the same ground as they arise in a will, under a gift to a class in which the number of persons is not defined.

### *Of Titles under Contingent Remainders.*

A CONTINGENT remainder must have all the general qualities of a remainder. It must be so limited that it may vest either during the particular estate, or *eo instante* in which the particular estate is to determine.

\*If there must be an interval between the determination [\*111] of the particular estate, and the commencement of the remainder, the remainder, as such, will be void.

Such a limitation over may, under circumstances, be good in a will as an executory devise, and in a conveyance, or gift, to uses, as a future springing use.

A remainder will be contingent for each or either of the following causes :

Because it is limited,

1st. To a person not *in esse*, as a child before its birth :

2dly. To a person not ascertained : as to the survivor of several persons who are living :

(1) *Watson v. Faron*, 2 East, 36.

Or to children who shall attain 21, or to persons who shall be living at the death of one, or of the survivor of their parents ; or to the survivor of several persons :

Or to the right heirs of a person who is living.

3dly. To a person, or body, which, though ascertainable at present, has not a present or immediate capacity ; as the right heirs of a person who is attained, and is dead, and whose attainder has not been reversed :

Or to a corporation while it has not a head ; as to a mayor and commonalty, when there is not a mayor : or to a dean and chapter, when there is a vacancy of the dean.

4thly. To a person or persons on a contingency, which is expressed, as to *A* for life ; and if *B* shall go to Rome, then to *B* in fee.

[\*112] \*5thly. To a person on a contingency which is implied, with reference to the possibility that the particular estate may determine before the remainder can commence in estate ; as to *A* for his life, and from and after his death, and the decease of *B*, or from and after the decease of *B*, then to *C*, or to any other person for life :

Or to *A* for life, remainder to *B* for twenty years, if *B* shall so long live ; and from and after the decease of that person, then to *C*.

6thly. To a person at a time unconnected with the event on which the particular estate is to determine ; as in the instance of a gift to *A* for life, and from and after the decease of *A* and *B*, or from and after the decease of *B*, then to *C*.

7thly. To a person on a contingent event, which is to determine the particular estate ; as to *A* and his assigns, until the return of *C* from Rome, namely, for a life-estate ; and from and after his return, to *B* (*u*) ; or to *A* and the heirs male of his body, until *A* should do a particular act ; and after that act done, then to *B* in tail (*x*). A gift to *A* and his heirs until, &c. is a fee, and does not admit of a remainder (*xx*).

All contingent remainders may indeed be reduced to two heads, as being contingent, either, first, because they are limited on a contingency which is expressed ; or, secondly, because they are limited on a contingency which is implied.

[\*113] \*The implied contingencies arise from the circumstance,  
1st, That the person is not in *esse* :

2d, That the person is not ascertained :

3d, That the person has not any immediate capacity :

4th, That the particular estate may determine before the remainder can commence in interest.

The criterion and distinguishing feature of a vested remainder is, that it is capable of taking effect in possession immediately, if the particular estates were determined.

(*u*) 3 Rep. 20 a.

(*x*) *Arton v. Hare*, Poph. 97:

(*xx*) *Preston's Essay on Estates*, chap. Fee.

No contingent remainder can be limited to commence,

1. On an event, or at a time which of necessity must happen, after the particular estate is determined; as in the instance of a gift to *A* for his life, and from and after the decease of *A*, and one day or one month, to *B* for life, or in tail, or in fee:

2. On an act which is illegal; as the commission of felony, or the like:

3. On an event which is termed a *possibility on a possibility*, or double possibility:

4. On an event which the law will not presume to be possible; as to a child to be begotten, and to be born out of wedlock, namely a bastard not in *esse*:

5. On an event which is to defeat and avoid the particular estate.

The rules which apply to contingent remainders may be stated in these terms;

\*1. There must be a particular estate of freehold to pre- [\*114] cede and support the contingent remainders.

2. Such particular estate must be created by the same deed or will, or fine, as creates the remainder; or by a deed or will containing the power which limits the remainder (*f*).

3. Some one particular estate must continue as an estate, or as a right of entry, until the remainder can vest.

An estate converted into a right of *action* will not support a contingent remainder (*g*).

But though an estate be suspended it will support the remainder (*h*).

No remainder can, in point of expression, be *too remote*; since the necessity, that the remainder should vest during the particular estate, or *eo instante* that the particular estate determines, and the liability of a contingent remainder to be defeated by the merger, &c. of the particular estate, are a protection against the inconvenience of perpetuities.

Remainders may be in contingency even until the expiration of an estate-tail, &c. (*i*).

But a remainder may be too remote and void, because it is limited to the children of a person unborn, and to whom a *prior estate for life is limited*. And all limitations over, by \*way [\*115] of remainder after, and expectant on, a remainder which is too remote, will also be void.

This is the doctrine of modern cases, though the decision most consistent with the common law would, perhaps, have been, that the remainders which were capable of effect should have been accelerated.

But a gift of a remainder to a person unborn, either for life, in

(*f*) *Venables v. Morris*, 7 Term Rep. 342. 438.

(*g*) 1 Fearn, 241.

(*h*) *Salter v. Butler*, Yelv. 9.

(*i*) *Phillips v. Deakin*, 1 Maule & Selwyn, 744.

tail, or in fee, will be good, unless it be preceded by a gift to the unborn parent of that person for life, or in tail.

A former observation is to be confined to leases for a life or lives, or an estate, not being a contingent remainder, for the life of some other person than the donee of that estate.

To offer comments on all these rules, and their application, and to show the exceptions to these rules, would require a profound treatise.

The elaborate Essay of Mr. *Fearne on Contingent Remainders*, and the head *Remainder*, in *Gwillim's* edition of *Bacon's Abridgment*, should be studied with the utmost diligence. Suffice it to say, that when the word "survivor," is used in the sense of other, or the words, "heirs," &c. are descriptive of a person in *esse* who is to take immediately ; or, when the words, though contingent in expression are not contingent in substance, as to *A* in tail, and if *A* shall die without issue, then to *B* ; or to *A* for life, and if

[\*116] *A* shall die in the life-time of *B*, \*then to *B* for his life, and not in tail or in fee ; or, when the limitation to the heirs, or heirs of the body, falls within the rule in *Shelley's* case ; or, when the limitation to the heirs is, in construction of law, the old reversion, so that the heirs are not to take as purchasers ; or, when the words sounding contingently are adverbs of time, merely denoting that the remainder is to commence in possession, at a corresponding period marked for the continuance of a prior estate ; as to *A* till *B* shall attain twenty-one ; and when *B* shall attain twenty-one, then to him in fee ; or, when an estate is limited from and after the death of a person who has a prior estate for life, or death without issue of a person who has a prior estate-tail ; or the words which refer to a future event (being an event which must happen, as the death of *A*,) do, in effect, merely mark the period at which a prior estate is to determine ; as in the instance of an estate to *A* for years, if *A* shall so long live ; and after his decease, then to *B* in fee, and the term exceeds the probable period of the life of *A* ; in all these and in like instances the remainder will not be contingent.

A contingent remainder for years does not require the support of a prior particular estate of freehold ; or that the particular estate of freehold should continue until the term can vest.

[\*117] And contingent interests which are to \*commence by way of springing or shifting use, or executory devise, are not governed by the same rules as contingent remainders.

It is sufficient that these interests can vest within the period prescribed by the rules against perpetuities.

Three rules however are to be remembered :

1st, No limitation will be allowed to operate by way of executory devise, or to have effect as a springing or shifting use, which, consistently with the language of the deed or will, and with the intention, can operate as a remainder.

2dly, Though a limitation operate in its inception, under the learning of springing uses or executory devises, yet from the moment in which the first estate of freehold shall vest, all the subsequent gifts, limited after and expectant on that estate by way of remainder, will be subject to the rules by which remainders are governed.

3dly, Although gifts in a will are by way of particular estate, and contingent remainders, yet if the particular estate should fail by lapse, &c. in the life-time of the testator, the gifts intended to operate as remainders may, by this change of event, become gifts to operate under the learning of executory devise.

These observations lead to other classes of cases which will be noticed when executory interests shall be the subject of observation.

*\*Of the Persons entitled under Executory Interests. [\*118]*

ALL contingent interests are executory ; but some interests are executory without being contingent.

Of this description are future uses, and interests by executory devise, which are to commence at a future but certain day ; or at a time which necessarily must happen ; as at the death of *A*, &c.

Executory interests do not admit of alienation by deed (*h*) ; but the equitable ownership may be aliened for a valuable consideration. These interests are devisable, may be re-leased, and may be bound or extinguished by estoppel (*i*) ; in the same manner and under the same circumstances as interests under contingent remainders.

While the interest remains executory there is not any estate ; but an interest may change from being executory into vested. No surrender or re-lease of right can be made with effect to the owner of a contingent or executory interest ; nor can there be any merger in his ownership. From the time when the interest becomes vested it is to be considered like all other vested interests.

If an executory interest be aliened whilst it remains executory, the title may be good in equity although defective at law. The defect \*in the legal title must be supplied by those [\*119] means which the circumstances of the case may require ; as by a conveyance from the owner of the executory interest after it is vested.

If a term for years be bequeathed to *A* for life, and after his death to *B* for the residue of the term, *B* has only an executory interest during the life of *A*, and this interest while executory may be assigned in equity ; is transmissible to the executors or administrators ; may pass by will, and assent, to a legatee, or be re-leased, but it cannot be transferred at law (*k*).

(*h*) *Lampet's case*, 10 Rep. 46 ; *Manning's case*, 8 Rep. 95.

(*i*) *Pells v. Brown*, Cro. Jac. 590.

(*k*) *Manning's case*, 8 Rep. 95 ; *Lampet's case*, 10 Rep. 46.

The whole legal estate is at first in *A*. A re-lease to him by *B* will discharge his estate from this executory interest ; and if *A* and *B* join in an assignment, this assignment will complete the title. It will amount to the assignment of *A*, and the re-lease of *B* (1).

But if the bequest be to *A* for a certain number of years short of the original term, and if he should so long live, and after the determination of that estate, then to *B* for the residue of the term, *B* would have a legal estate, and so would *A* ; one by way of particular estate, the other by way of remainder ; and it is rather singular that this form of limitation was not originally introduced into practice.

[\*120] When lands of inheritance are limited by \*way of executory devise, the inheritance, in the mean time, till it can vest in the devisee, will descend to the heir at law, unless it be otherwise disposed of ; as it may be by a particular or residuary devise. Of course the concurrence of the heir at law is in some cases necessary to complete the title, when it is accepted before the executory interest confers a title to a vested estate.

In general, an executory devise cannot be barred by the person who has the estate subject to this devise ; and therefore if a devise be made to *A* and his heirs for ever, and if he should die without issue living at his death, then to *B* and his heirs, no act done by *A*, by common recovery, or otherwise, will bar this executory interest (m).

But an estate-tail may be subject to an executory devise ; as to *A* and the heirs of his body, and if *A* should die under the age of twenty-two years, then immediately after his death his estate shall cease, and the lands belong to *B* in fee or in tail. This limitation to *B* is good only by means of the learning of executory devises ; because it is limited in derogation and in abridgment of the prior particular estate, and is, in the prescribed event, to defeat that estate, without any regard to the circumstance, whether or [ \*121 ] not there shall be a failure \*of issue of *A*, to cause the regular and proper determination of the estate-tail.

And a common recovery suffered by the tenant in tail, before the time shall arrive, and of course while his estate is continuing, will bar this executory interest, because the effect of a common recovery is to bar the estate-tail, and also all conditions and collateral limitations annexed to the estate tail ; and, as a consequence, it will bar this executory devise as a collateral limitation.

The like observation, *mutatis mutandis*, is applicable to estates-tail which are subject to collateral limitations by way of shifting use.

Also, if there be an estate-tail with the reversion in fee, and this reversion in fee is disposed of by way of executory devise, the interest under the executory devise will not be protected. It may be barred by the common recovery of the tenant in tail ; for as he

(1) *Manning's case*, 8 Rep. 95 ; *Lampel's case*, 10 Rep. 46.

(m) *Pells v. Brown*, Cro. Jac. 590.

may bar the reversion in fee, he may, as a consequence, bar all estates and interests derived out of the reversion.

If instead of the limitation to *B* to take effect on the event of *A*'s dying under the age of twenty-two years, the limitation had been to take effect on the death of *A* under that age, and without issue living at his death, this limitation to *B*, instead of being an executory devise, would have been a contingent remainder. This remainder might also have been barred by a common recovery. [\*122]

\*Entails, by way of executory devise, will not, while they remain executory, enable the owner of this interest to suffer an effectual recovery, so as to bar either his issue or those in remainder. It may operate by way of estoppel and extinguishment. But by a fine with proclamations the owner of this interest may bar his issue, as well as bind them by estoppel.

The like observation is applicable to contingent interests, whether they are by way of contingent remainders or executory devise.

On the subject of executory interests, and in particular executory devises, *Fearne* on Contingent Remainders and Executory Devises is the book proper to be consulted.

In reading with care this valuable book, rendered still more valuable by Mr. *Butler*, in pointing out the proper divisions of the work, a vast portion of professional knowledge, on a great variety of subjects, and of the utmost importance to correct practice, will be attained.

In the tracts on alienations by tenants in tail, cross-remainders, &c. there is also a note on the difference between vested, contingent, and executory interests, which may throw some light on this subject.

And in the introductory chapter to the *Essay on Estates*, the difference between vested and contingent interests, and interests which are executed and executory, is briefly stated, and may help the student to take a short but \*comprehensive [\*123] view of this abstruse learning; generally considered difficult, but easy to be understood, if care be taken to lay a proper foundation for pursuing this branch of the law through all its niceties.

The caution to be observed in studying the more abstruse parts of the law, is, in the first place, to obtain a correct knowledge of the nature of these special and peculiar interests; to collect the more correct definitions; to ascertain the circumstances by which these interests are to be distinguished from other interests apparently the same, but substantially different; to discover the properties of the different interests; the nature of the ownership they confer; the means by which they may give a complete title, or eventually fail of effect, may be destroyed, or defeated, and by what means they may be aliened, barred, or bound at law, or in equity.

In his *Essay on Executory Devises* Mr. *Fearne* has distinguished

three sorts of interests of this description. To these six others *may* be added.

The three species of executory devise, &c. stated and exemplified by Mr. *Pearne*, are,

1st. Where the devisor departs with his whole fee-simple ; but, upon some contingency, qualifies that disposition, and limits an estate on that contingency :

2dly. Where the devisor gives a future estate [read, interest] to arise either upon contingency, or at a time certain, but does [\*124] not depart with \*the fee at present, or limit any immediate freehold :

3dly. Where a term for years, or any personal estate, is devised to one for life, with remainder [read, a limitation] over.

Two of these varieties are proper to estates of freehold ; the other embraces chattel-real estates, and personal property.

It seems, however, that there are six sorts of executory devise applicable to freehold interests, and two, at least, if not three, sorts of executory bequests applicable to chattel-real interests, and personal property.

1st. *Pells v. Brown* fully proves the first sort of devises noticed by Mr. *Pearne* : In that case the testator parted with his whole fee-simple ; but upon some contingency the devise was to the testator's wife for life, remainder to *C* his second son, in fee, provided, if *D* his third son should pay £500 within three months after his wife's death to *C*, his executors, &c. then the testator devised the lands to *D*, and his heirs.

This gift qualified the first disposition, and limited an interest on a contingency. No other remark is necessary on this case : *Marks v. Marks* (n) is open to the observation, that the devise to *D* was executory only so far as related to the estate of *C*. It did not extend to defeat the prior estate limited to the wife for her [\*125] life ; and it was executory, because it \*was to take effect eventually, and in derogation and abridgment of an estate in fee. In reference to that estate it could not be a remainder, since it did not, and indeed could not, depend on the determination of the estate for life, because the estate for life was to determine before the gift to *D* was to confer a vested interest.

2dly. When the testator gives a future interest of freehold, to arise either on a contingency, or at a time certain, but does not depart with the fee at present, or limit any immediate freehold, this interest must be void, or operate as an executory devise. This is clear. A single substantive devise to the heir of *I S*, or to the first son of *I S*, when he shall have one, is a devise of this description.

The devise is future, because at the testator's death there is no person who can take immediately under this devise ; and when lands are devised to *I S*, for five years from next Michaelmas, remainder to *B* in fee ; and the testator dies before Michaelmas, then the devise to *B* is future ; for although the remainder is limited to



a person already in existence, and without any words of contingency, and is immediately expectant on the term; yet since the term is limited to commence from a future period, to happen after the testator's decease, and since the term is not *vested*, and since an *interest only*, and not an *estate*, is acquired in the land; the \*remainder in fee cannot be vested while the term for years [\*126] remains future and executory.

At the common law such a limitation to *B* by deed would have been void (o). In its creation the limitation to *B* is a freehold, to commence in interest or estate at a future time. And since the term for years cannot vest immediately, the remainder to *B* must remain future and executory, till the term becomes a present and immediate interest.

These determinations all depend on principles of the common law for avoiding an abeyance of the freehold. At this day they may be accounted rigid in the extreme. It may be urged too, that all the ends of justice would be perfectly answered by giving the ownership and interest to the heir at law for the limited period during which the possession might otherwise be vacant; and measuring the extent and denomination of his interest by that time. In some cases this is done in the construction of wills, and of uses in conveyances to serve the uses; and more especially in uses to arise on the seisin of the author of the uses. *Roe v. Tranmer* (p); *Doe v. Whittingham* (q).

In the construction of deeds, and of surrenders of copyhold lands, being assurances which owe their whole force to the common law, this is *\*never done*. The few instances in which [\*127] it is done, even in the construction of wills, are those only in which the heir at law may, consistently with the testator's general intention, take an estate for the exact period of his life, or for the exact time of an estate-tail; or an estate arises to a wife for life, by reason of a gift to the heir after her death; and in those cases the estates for life, or in tail, are taken by implication of law for the advancement of the testator's general intention; *Walter v. Drew* (r), and *Wealthy v. Bosville* (s), are instances of the heir's taking an estate-tail under those circumstances. The case of *Pybus v. Milford* (t), may be adduced as an authority for an estate for life arising by implication.

All the cases, however, require that the testator, in making the arrangement and disposition of his property, should have left those vacancies of right of enjoyment which are exactly correspondent with estates for life or in tail, and allow of their being implied as existing in his intention.

When the time, of which no disposition is made, is for days, or for years [*Gardner v. Sheldon* (u)], or till there shall be a failure of the issue of any stranger, or any other person, in all these cases the heir at law does not take any estate by implication; and, except in a few \*cases, unless he can take, no other [\*128]

(o) Litt. §360: *Buckler's case*, 2 Rep. 55. (p) 2 Wils. Rep. 15. (q) 4 Taunton, 23.  
(r) Com. Rep. 372. (s) Rep. T. Hardw. 268. (t) 1 Ventr. 372. (u) Vaugh. 259.

person can claim to be entitled. The exceptions will be collected and stated in the *Essay on Estates*.

It follows, that unless the heir at law, or the widow of a testator, may have an estate by implication, the heir at law will take the fee when the first estate of freehold is limited to commence from a future time, or from an event.

It follows too, that when the wife takes an estate of freehold by implication, then the devise sounding futerely, and giving occasion to that implication, operates immediately, and by way of remainder. In other cases also, devises which sound futerely may not refer to any contingency, as is exemplified in former observations, and in the cases collected in the *Essay on the Quantity of Estates*, chap. Freehold.

And in the case (u), in which the testator devised to his wife, till his son should come to the age of twenty-one years, and then that his son should have the land to him and his heirs, and if he should die without issue before the said age, then to his daughter, the devise to the daughter was a good executory devise ;

1st, Because a fee was previously limited ;

2dly, Because the devise was to determine and defeat [\*129] that estate, in the event that the \*person to whom the fee was previously devised should die under the age of twenty-one years.

This case, and also the case of *Marks v. Marks* (2a), are composed of circumstances precisely similar, and are governed by the same principle. The case in question properly belongs to the first sort of executory devises ; it has no relation to those of the second sort, since the fee was previously disposed of, and that disposition was qualified on a contingency ; and the more remote devise was limited to take effect upon the contingency. In the last cited case the ulterior limitation gave an estate by executory devise, because the previous limitation was to the brother in fee ; and his estate was to be defeated only in the event that he should die without issue, under the age of twenty-one years, and not to be determined merely on the failure of the issue of his body, or the determination of an estate-tail. Suppose the words introducing the estate devised to the daughter to have stopped at the word issue, then the words of limitation to the daughter would have qualified the estate of her brother into an estate-tail. But as the devise was to the brother and his heirs, and the estate devised to the daughter was not to take effect certainly either in possession, or in interest, on the event of the death of her brother, without heirs of [\*130] his body (the regular and proper determination \*of an estate-tail), but only in the event of his death before a limited time, the general import of the word heirs stood not only unimpeached, but explained in a special and qualified sense ; and therefore gave a fee to the son. This is a point of difference continually occurring, and deserving of attention.

The third sort of executory devises of freehold interests may be described to be *where the testator gives a future interest of freehold, to take effect in possession after, and in subordination to, a particular estate of freehold; but the estate of freehold must necessarily determine before the more remote interest can come into its place*: thus leaving an intermediate space between the actual determination of one estate and the commencement of the other estate (x).

A devise to *A* for life, and after the decease of *A*, and one year, then to *B* in fee, or to several persons for particular estates, is an instance.

The devise to *B* is a disposition of a future interest of freehold, and is void by the rules of the common law, and to be supported only as an executory devise.

In a will, the superadded devise is good as a new and independent disposition, leaving the reversion in fee to descend to the heir at law, expectant on the decease of *A*, and liable to be drawn from him again after the given space from that event shall be completed.

\*The gift to *B* would, under the learning of executory [\*181] devises, and admitting the estate for life had not been previously limited, have been incontrovertibly good; since the several devises are independent of each other effect is not denied to the more remote interest on account of the estate of freehold previously devised; since there is not any connexion between the estates, or any privity or relation between the several owners claiming under the will.

The preceding estate of freehold cannot support the future interest as a remainder, since the devise to *B* is a future interest of freehold; and the prior estate of freehold must necessarily determine before this more remote interest can come into its place, and must leave an interval between the determination of one estate and the commencement of the other estate. There would be a vacancy of ownership in the intermediate time, unless the fee descended to the heir at law immediately expectant on the estate of freehold limited by the will. It is clear, the fee will descend to the heir at law during this suspense of the fee under the will.

The fourth sort of executory devise of real estate is where a *particular estate*, as distinguished from the fee, either with or without a disposition of the fee, is given by will, and there is a devise in the same will to take effect in derogation and abridgment of that estate, \*before the period of its regular and proper [\*182] continuance is accomplished; or where an estate-tail, or an estate for life, is limited to one person, and on an event, that estate is to cease and be defeated; and another estate is to arise, or a remainder is to be accelerated and take its place.

*Page v. Hayward* is no authority for a contrary conclusion.

In *Page* and *Hayward* (y), the testator devised to *A*, and the heirs of her body; provided, and upon condition, that she inter-

(x) Plowd. 25; Raym. 144.

(y) 2 Salk. 570; Fig. Rec. 176.

married and had issue male by one surnamed *Searle*; and in default of both conditions the testator devised to *E* in the same manner; and it was adjudged by the court, that the estate devised to *A* was a good estate in special tail, to her and the heirs male of her body begotten by *Searle*; and that the words upon condition, though words of express condition, should be taken to be words of limitation; and so the sense was, that upon her death without issue by a *Searle* the estate should remain over.

That this disposition was good as a remainder depended on the construction of the whole will; for on the context, the estate-tail was commensurate only with the time at which the other estate was to come into its place.

[\*133] \*The estate was to her and the heirs of her body begotten by a *Searle*, and to cease with the failure of these heirs, and not in the mean time; and therefore her estate could not determine in her life-time, since, till she was dead there was not any certainty that there would be a failure of heirs of her body of this description.

And the devise over was to take place only in the event that there should be a failure of these heirs; and consequently not before the regular and proper determination of the estate-tail. It was on this precise point that the case was decided; and the circumstance which led to the decision was, that upon the collective exposition of the will, the heirs of the entail were to be the issue by a man of the name of *Searle* only; and that the subsequent limitation was not to abridge that estate, but to commence in possession after the regular and proper determination thereof.

From the same case it is clear, that if the words of condition had been of a tendency to defeat the estate-tail in the life-time of *A*, they would not have given a proper remainder. They would have operated as a conditional limitation; and would indeed have been good only by executory devise. This drew from the court the opinion, that if the estate had been to *A* and the heirs of her body, by a *Searle* begotten, provided, upon condition,

[\*134] that if she married any but a *Searle* that then it should \*remain and be to *I S* and his heirs, a common recovery before marriage would bar the estate-tail and remainders.

Now, from the mode of stating the case, the court clearly understood that this secondary limitation was to operate by executory devise, and not as a remainder.

For it was the opinion of the court, that the condition might, in such a case, and unless barred, have determined the estate-tail in the life-time of the tenant of that estate, to the exclusion of the same; consequently it would not have given a strict and proper remainder.

That this was the sense in which the case was understood by the court, is clear, from stating the recovery to be suffered before the marriage. From that circumstance the inference is, that the conditional limitation might, in the supposed case, have taken place,

unless barred by the common recovery; and that the common recovery to be a bar must be suffered while the person taking under the prior limitation was tenant in tail, and consequently before the contingency to defeat that estate should happen.

In *Gulliver v. Ashby* (z) the argument proceeded upon these very grounds, either that there were not any *express words* to make a conditional limitation, or, that if the estate-tail was \*sub- [\*135] ject to a limitation of this sort, the recovery was suffered before the estate-tail was determined, and the recovery did of itself bar the conditional limitation.

The opinion, then, of the court, in *Page v. Hayward*, or the opinion of the court in *Gulliver v. Shuckburgh Ashby*, does not militate against the conclusion that an estate-tail may be defeasible by an executory devise. It rather follows from these cases, that all interests which are to take place in derogation and abridgment of a vested estate-tail are executory devises.

The observation of Mr. *Fearne* (a), is, "Here we are to attend to the distinction between the first limitation being in fee, and its being only in tail; in the first case, we have seen the limitation over upon *A* dying without issue living was good as an executory devise; for the whole fee being first limited to a person in *esse* there was no considering the subsequent limitation as a remainder. But if the first limitation had been in tail only, then the subsequent devise might have been considered as a contingent remainder, depending on the estate-tail, and as limited to take effect only in case that estate-tail determined in the life of *A*; that is, in case the first devisee in tail died without issue in *A's* life-time."

\*But this observation is quite consistent with the observa- [\*136] tions submitted to the reader. This is obvious from the authorities he has adduced. The fact is, Mr. *Fearne* was keeping *Page v. Hayward*, and the decision in that case, strictly in view. In 310, Mr. *Fearne* admits this point.

So in *Spalding v. Spalding* (b), the devise was to *I*, a son of the testator, in tail; and if *I* died, leaving *A*, then *A* to be *I's* heir. The court construed the intention to be, that *A* was to succeed to his brother *I* only in the event that *I* should die without issue, and that *A* should be living when the estate-tail of *I* should determine; so that *A* had a strict and proper remainder.

That this was the construction by which the will was interpreted, is clear from the Report; for it states the ground of the determination in these words; "the court conceived that the construction ought to be, if *I* die without issue, living *A*, consequently the estate-tail was to have filled its measure before the remainder was to commence in possession.

It is not an authority that a limitation to take place with reference to an estate-tail may not be good as an executory devise; nor does it prove that any limitation in a will, after an estate-tail, must

(z) 4 Burr. 1929.

(a) 3d edition, p. 307. "

(b) Cro. Car. 185.

necessarily operate as a *remainder*, and therefore wait for [\*137] the regular determination of that estate, without any \*possibility of having effect in exclusion of the estate-tail. In that case, from the penning of the will, the limitation over gave a contingent remainder, and the remainder was contingent, from the circumstance, that it was not to commence in interest, certainly, on the regular and proper determination of the estate-tail, but only in the event that the estate-tail should determine within a given time, and, as the contingency was expressed, in the life-time of *A*. The true point of this case is, that by the intention of the parties, though inaccurately expressed, the limitation to *A* was not to defeat the estate-tail, and therefore the intention did not call for any reference to the learning of executory devises; it was to take place on the proper determination of that estate, in the event that *A* should be living at that time, and therefore was a good and proper remainder, though contingent, from the circumstance, that it was to commence in interest only on a contingency connected with the regular determination of the preceding estate.

Then, since words of condition, or rather conditional limitation, do in some cases, at least, tend to the abridgment and defeazance of estates-tail, it will follow that there is this fourth sort of executory devises of freehold interests.

On the cited case of *Gulliver and Shuckburgh Ashby*, it may also be observed, that the words of proviso were considered [\*138] to be words \*of recommendation, and not of limitation. The court considered the case, and heard the argument on it, as involving a question of intention, whether one estate was to be substituted in the place of the other on non-performance of the condition.

They did not see any objection to allow that a clause of defeazance may operate upon an estate-tail as a *conditional limitation*, to cease a prior estate, in favour of a more remote one; and every conditional limitation in a will to abridge or defeat another estate of a freehold interest, is, if valid, an executory devise; for it is in this mode only that it can be effectual, since the common law has not any rule to support it; and conditional limitations of the like sort, in conveyances to uses, are allowed to have effect as shifting uses; and the cases applicable to uses are authorities to prove that similar limitations in wills may operate as executory devises.

But the point does not rest on mere conjecture, deduction, or argument; for the case of *Fry v. Porter* (c) is fully in point. In that case the gift to lady *Ann Fry*, the testator's heir, was for an *estate-tail*, upon condition, that if she married without consent, or died without heirs of her body, then to another person, and his heirs, so that there was a remainder in one event, and a [\*139] conditional limitation in another \*event; and the contingency or event having arisen, the estate tail was determined;

and the determination must have been under the learning of executory devises; since a remainder, as such, cannot abridge or defeat the prior or particular estate. This is the like case as was put by way of supposition in *Page v. Hayward*.

Besides, the common and ordinary dispositions in wills, whether they be by way of direct gift, or through the medium of uses, by which the estate of tenant in tail is, on some act done or omitted, to cease, as if he were dead without issue inheritable to the estate-tail, and some stranger is to have the possession in his stead, or some remainder is to be accelerated by way of substitution, in place of the estate so avoided or defeated, are examples of the same nature. They operate under the learning of executory devises or shifting uses; and in direct opposition to the common-law learning applicable to remainders.

A fifth species of executory devise of real estate is where an estate tail, or an estate in fee, is on some event reduced to an estate for life (d).

This could not be accomplished at the common law. In effect, there are two distinct gifts; one is a substitution for the other. That the substitution can take place is the indulgence \*allowed to the will of testators under the learning of [\*140] executory devises, springing uses, &c.

That there is a sixth species of executory devise of real property may be concluded from general principles; and it may be defined to be where there is a devise of an estate of inheritance, or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance, and to a partial though not total exclusion of the same.

The doctrine of uses admits of substitutions of this nature; and this is a strong reason for concluding that they may be made under the doctrine of executory devises; since executory devises incontrovertibly owe their origin to the learning of uses, and particularly to the doctrine of springing or shifting uses, and are deducible from that learning. Therefore, without referring to any authority determined on this particular point, it might, perhaps, be thought sufficient to rely on the learning of uses. But the case of *Hanbury v. Cockerell* (e), properly understood, goes the whole length of establishing this position, even in reference to executory devises.

In that case, a testator devised lands to his son B, in fee, and other lands to his son C, in fee, subject to a proviso, that if either of his \*sons should die before they should be married, [\*141] or before they should attain the age of twenty-one years, and without issue of their bodies, then he gave all the lands which he had given to such of his sons that should so die, &c. unto such of his said two sons as should the other survive; it was held, that the sons took in fee, subject to a limitation to the survivor for life,

(d) *Wright v. Wright*, 1 Ves. 409.

(e) 1 Roll. Abr. 334.

in case of either dying unmarried, or under the age of twenty-one, without issue.

The question upon the case is, did this executory devise wholly defeat the original devise to the sons, or only introduce the limitation to the surviving son by way of exception, and for an estate for life only?

The case of (*ee*)

is no authority for the contrary of this position: for according to the construction which the court gave to the devise in favour of the daughter of *P*, the daughter was to take an estate for life, to precede the estate devised to *F* and *P*, and they were to have a remainder expectant upon this particular estate; and the estate to the daughter was not to determine, or in any degree defeat, the fee after it was vested. In simplicity of construction it was an immediate devise to the daughter of *P* for life, remainder to *F* and *P*, as tenants in common in fee, and not, as imported by the words, an immediate devise to *F* and *P*, as tenants in common in fee, and to be [\*142] defeated or \*abridged by an event to arise *after the death of the testator*. Suppose the devise to *F* and *P* had been so penned as to have given to *F* and *P* an immediate estate after the death of the testator; and that the devise to the daughter of *P* had limited to her an estate for her life, to supersede their estate after it had been vested, or in any other event than one necessarily connected with, and to be ascertained at, the testator's death; then the devise to her would have been executory, on the ground that it was not limited to precede the commencement in possession, or to wait for the regular determination, of the interest given to *F* and *P*; but was, in a particular event, to exclude that estate from its place, by interposing another estate, and abridging, and partially defeating, that degree of interest to which *F* and *P* were originally entitled under the devise to them. In this respect the case assimilates itself to *Carwardine v. Carwardine* (*f*).

That there are two sorts at least, if not three, of executory bequests of chattel-real and personal property, is perfectly clear. One sort (and it is the one noticed by Mr. *Fearne*) is where a term of years, or any personal estate, is devised to one for life, with a limitation over, improperly termed a remainder.

The second sort is where there is a complete disposition of the term or property; and there is a substitution of another [\*143] person to take in \*some event which is to defeat or abridge the former gift. This secondary disposition does not operate by way of *remainder*, and in a deed would not, except by way of trust, be allowed to have effect. In wills it is permitted to be valid in favour of the testator's intention, and that his will may not be disappointed. Perhaps it may be said that this sort of bequest is the same in principle with the sort first mentioned. It differs materially in circumstances; and this difference is a sufficient inducement for

(*ee*) The reference to this case is mislaid.

(*f*) *Fearne*, Butler's edition, p. 388.



pointing to the distinction ; urging it as falling under another class, though clearly to be referred to the same origin.

Between these two classes of gift there is as much diversity as there is between the several sorts of executory devises of freehold interests, which Mr *Fearne* has noticed.

They are all branches from the same root, and different only in their ramifications.

The *third sort* is, where there is a substantive and independent bequest, to wait for effect till the death of a life or lives in being, or till a contingency, in some manner connected with that event simply, or that event attended with a failure of issue at that time, or any given period. At least, unless this instance be an example of an executory bequest, it involves all the learning on the subject, as to the creation and qualification of such interests.

Numerous instances, fully exemplifying the proposition, and descriptive of executory \*bequest, are to be found in [\*144] books which treat on the subject of executory devise, and are referred to this learning. The only doubt which can be raised of their coming fully within the definition of an executory bequest is, that perhaps they are good at the common law. But the example of a bequest of a term to *A*, after the death of *B*, to whom no interest is given, seems fully to establish this third species or variety, for such a gift would not be good if found in a grant at the common law (*g*).

On all future interests arising from dispositions of personal and chattel-real property, it is observable, that they cannot, under any of the modes of gift which have been noticed, give a remainder, in the proper sense of that term. They give interests, which are in the nature only of remainders. Even in those instances in which one limitation is to wait for effect till the interest which passes by another limitation is determined ; as to *A* for life, and after his decease to *B* ; *B* has not any remainder, properly so termed. The whole estate is in *A*, till his interest determines by his death (*h*).

Since the principal object of this chapter has been to define executory devises, and distribute them into their several classes, a few observations will be proper to mark the time during which devises, &c. receive this denomination. It applies to devises, &c.

\*1st, In the mode of their creation ; and, [\*145]

2dly, During the period while the interests are in an executory state. The instant they become vested they receive that denomination ; and (as far they are of freehold,) when *the first estate of freehold becomes vested, all the estates expectant thereon, and limited by way of remainder, will be either vested or contingent remainders.*

Limitations of chattel-real and personal property are subject to different rules. No interest, except that of the immediate possessor, can be vested.

(*g*) *Jermyn v. Orchard*, Show. Par. Cas. 189.

(*h*) *Lampet's case*, 10 Rep. 46 ; *Manning's case*, 8 Rep. 95.

With this preliminary observation, it may be safely asserted, that a *will operating by executory devise may give interests, which at one time will be executory ; at another time contingent, as a remainder ; and ultimately vested ;* and the term "executory devises," is applicable only to the mode of their creation, and the time while they are under the protection of the rule relating to interests of this sort.

In considering titles which involve the learning of executory devises, and shifting uses, it will frequently be necessary to advert to the law concerning perpetuities ; being the rule of law which has guarded against the attempts, made at different periods, to suspend the power of alienation, or to provide a fund of accumulation for an unreasonable period of time.

A short review of this rule may be taken as it applies to,

[\*146] 1st, Particular estates.

2dly, Remainders.

3dly, Executory devises, springing and shifting uses ; and,

4thly, Trusts for accumulation.

#### 1st, *As to Particular Estates.*

CHATTEL interests were of very little account in the early history of the law. When the principles of feudal tenure prevailed, the period when the general rules of property were established (i), the freehold was principally regarded ; and hence the rules which so anxiously provide against the *abeyance* of the freehold.

Even though a term of years may be granted to commence *in futuro* ; an estate of freehold, limited after, and expectant on, such future interest, will, under the rules of the common law, be void (ii).

Hence also the rule, that though a term of years may be created without livery, yet if a term of years be limited to *A*, with remainder to *B* for life, in tail, or in fee, livery of seisin must be made to the termor, in order that the benefit of the livery may be communicated to the estate of freehold (k).

Hence, also, if a grant be made to a man for years, to be [\*147] enlarged, on condition, into a fee, \*livery must be made at the time of the grant, and will pass the fee immediately (l), subject to be defeated, unless the condition be performed ; and afterwards the grantee will hold for the term of years if it be not expired (m).

#### 2d, *As to Remainders.*

THE common and ordinary form of limitation is to *A* for life, remainder to the first and other sons of *A* in tail, remainder to *B* for life, remainder to his first and other sons in tail.

As far as these sons are in existence the remainders are vested ; and as far as they are unborn, the remainders are contingent.

(i) *Preston's Essay on Estates*, chap. Freehold. (ii) *Buckler's case*, 2 Rep. 85.  
(k) Litt. § 80 : 1 Inst. 217 a. (l) Litt. § 349, 350 : 1 Inst. 216 a. (m) *Ibid.*

As contingent remainders, when they are of the legal estate, and of freehold lands, they may, by the rules of law, be destroyed by surrender, merger, forfeiture, or destruction of the particular estates before the remainders can vest.

But limitations of contingent remainders by way of trust, cannot be barred by any act of the particular tenant.

Contingent remainders of the legal estate, either of freehold or copyhold lands (n), may fail of effect by the determination of the prior particular estates of freehold quality, before the remainders can vest in interest. This axiom was grounded on the rule of law, which cautiously avoids *the abeyance* of the freehold (o).

\*But contingent remainders limited of the trust, may [\*148] take effect, notwithstanding all the particular estates should fail before the remainder can vest in interest.

The common law does not seem to have adopted any other rules against remainders, as tending to a perpetuity, than that (first,) all estates for life should be measured by the lives of persons in *esse* : and (secondly,) that every remainder should come in *esse* as a vested estate, during the particular estate, or *eo instante* in which the particular estate should determine.

All remainders may vest in interest, unless they be obnoxious to the objection of contravening the policy of law against perpetuities.

A gift to *A* for life, remainder to the first son of *B* who shall attain the age of twenty-five years, is a good remainder under the rules of the common law. That the remainder is good, and free from the objection of being a perpetuity, arises from the circumstance, that the law annexes to this remainder the qualification that it must either give a vested interest, or fail of effect, during the particular estate, or in the very instant in which that estate shall determine.

If a like limitation of the trust be good, it must be on the ground that the courts of equity must annex to the gift of the remainder a qualification, by construction, that the son shall attain twenty-five in the life-time of *A*.

\*Unless it be valid in this mode, the gift is too remote, [\*149] and void.

A gift in any other mode than by way of remainder, to a class of persons, as, children of a person in *esse*, attaining twenty-five, &c. will be void, although some children are in *esse*, and will be twenty-five within the period of twenty-one years (p).

But a gift to children of a person dead at the date of the gift, who shall attain twenty-five ; or to each of certain persons, as children in *esse*, and named, who shall attain twenty-five, &c. is not open to the objection of being too remote.

There is also a difference between contingent remainders of lands of freehold, and lands of copyhold tenure.

(n) 2 Ves. jan. 209 : 1 Watk. Copyhold, 192.

(o) Gilb. Ten. 166 : *Preston's Essay on Estates*, chap. Freehold.

(p) *Audley v. Gee*, 1 Cox's Rep. 524 : *Leake v. Robinson*, 2 Merivale, 363.

Contingent remainders of copyhold tenure may fail of effect, by the regular determination of the particular estate before these remainders can vest in interest (q) ; but they cannot be destroyed by surrender, forfeiture, or the like act, proceeding from the owner of the particular estate ; and contingent interests of the trust of copyhold lands, may also, under the learning of springing or shifting uses, rather than of remainders, take effect, notwithstanding the determination of the particular estate before these remainders can vest in interest.

[\*150] The rule of law respecting remainders has \*also guarded against the suspense or abeyance of the freehold, by rendering it necessary that every remainder shall be so limited, as to vest in interest during the particular estate, or *eo instante* in which that estate shall determine.

For this reason a limitation to *A* for life, and after the decease of *A*, and one day, to *B* in fee, is, in point of law, and as a remainder, void in its limitation, because there is an *interval* between the remainder and the particular estate. But such a limitation, by way of executory devise, springing use, or trust, would be good, as has already been shown.

Another rule of the common law respecting remainders, is, that *every remainder must wait for effect till the regular and proper determination of the prior estates.*

One estate is not allowed to be limited in derogation, or abridgment, or defeasance, of another estate ; but each estate must take effect successively in order and course, as it is limited. And even by the rules of the common law, a *condition* annexed to a particular estate will be annulled by the limitation of remainder, after the estate to which the condition is annexed ; since no one, except the grantor or his heirs, as to real estate, or executors or administrators, as to chattel interests, can, by the rules of the common law, take advantage of a condition (r).

[\*151] \*A gift by will of property held for estates of inheritance, or for lives, may operate by way of executory devise, 1st, Because the first estate of a freehold quality, is given

1. To commence from a certain time, which shall not have arrived at the devisor's death.

2. To commence on an event which does not happen in the testator's life-time.

3. To a person, who at the death of the testator is not ascertained ; as to a person not then in *esse* ; or to the survivor of several persons.

2dly, Because an estate of a freehold quality, though limited after a particular estate of a freehold quality, is to take effect from and after an *interval between* the determination of a particular estate,

(q) 2 Ves. jun. 209.

(r) Litt. § 266 ; 1 Inst. 118 b ; Doe v. Lawrence, 4 Taunt. 23 ; Preston's Shep. Touch. 117.

and the time appointed for the commencement in interest of the gift in question.

All these gifts correspond to *springing uses*, and are of the same nature or quality.

As they assimilate to springing uses, they may, with propriety, be denominated *springing interest by devise*.

3dly, Because the gift (though it is to a person not ascertained, or not capable of taking immediately) is after a particular estate of freehold quality which fails in the life of the devisor.

4thly, Because the gift is in derogation, or abridgment, and in defeasance, in the whole or \*in part, of an estate [\*152] previously limited for life, in tail, or in fee.

This species of devise is, in some instances, of the nature of a shifting use; in other instances, of the nature of a springing use.

A gift by will of personal estate, or of terms of years, or other chattel interest, may operate by way of executory bequest:

1. Because it is to a person after, and expectant on, a previous gift for life:

2. Because it is to a person in *esse*, or not in *esse*; ascertained, or not ascertained; on some event or contingency by which the preceding gift is to be defeated, wholly or in part:

3. Because a gift previously made is to be partially defeated by a subsequent gift of a particular interest.

And lastly, every direct gift by will, which is good, and yet contrary to the rules of the common law, operates by executory devise or bequest.

And as a consequence of the rule against perpetuities, every gift by executory devise must be so limited as to vest, or fail of effect, within a life or lives in being, and twenty-one years, and the periods of gestation. There follows this result;

Every gift by will, which cannot, on the one hand, have effect, except under the learning of executory devises; and on the other hand, is so limited that it must wait for effect, as a vested interest, until the indefinite failure of \*issue of any person, [\*153] is too remote, and for that reason void; though it be limited after, and expectant on, a prior gift to another, and the heirs general or special of his body.

The subject of executory devises, &c. is of such general importance that it merits a more detailed consideration; and a few observations will be added in further elucidation of the subject.

The general rule, as already stated, is, that no gift or limitation in a will, or of an use, will operate under the learning of executory devises, springing or shifting uses, if it can have effect by the rules of the common law.

Hence the observation of Mr. *Fearne* (s): 'Wherever a future interest is so limited by devise as to fall within the rules above laid down for the limitation of contingent remainders, such an interest

(s) *Fearne*, 290, 3d edition.

is not an executory devise, but a contingent remainder. The observation of Lord Keeper *Henley* in *Carwardine v. Carwardine* (t), is, that it was a certain rule of law, that if such a construction could be put upon a limitation, as it might take effect by way of remainder, it should never take place as a springing use or executory devise.' And Lord *Kendon* observed, in *Doe v. Morgan* (u), "That if ever there existed a rule respecting executory devises, which had uniformly prevailed, without any exception to [\*154] the contrary, it was that which was laid down \*by Lord *Hale*, in the case of *Purefoy v. Rogers*; that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.

A consequence from this rule is, no gift by will or by use will operate by executory devise, if at the time when the instrument becomes complete, it can, consistently with the intention, and the language in which that intention is expressed, operate as an estate in possession, or as a remainder, vested or contingent.

But a limitation may in one alternative be a gift of a proper remainder; in another event an executory devise or shifting use; as to *A* for life, and after his death, to his first son in fee, being a son unborn; and if there should not be any son, or if such son should die under twenty-one, then to *B* in fee.

In construction of law there are two distinct gifts.

This gift will be an alternate remainder, and in contingency, so far as it is a substitution for the gift to the son; and an executory devise, or shifting use, so far as it is to defeat the estate of the son, in the event of his death under twenty-one.

So an interest, limited by way of contingent remainder, and which would be void, as such; may, by a change of events in the life of the testator, become a gift by executory devise.

[\*155] \*And a gift which in its frame, was an executory devise, may, by the change of circumstances in the life-time of the testator, become,

1st, A vested estate in possession;

2dly, A vested remainder; or,

3dly, A contingent remainder liable to destruction.

"Wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken (x)." Therefore a more remote interest cannot be vested when a more immediate interest is executory.

And if the more immediate interest be too remote, every limitation over must, with certain qualifications afterwards noticed, be too remote.

But a residuary devise, or a special gift, substituting a devisee in

(t) *Buller's Fearné*, 392.

(x) *Fearné*, 3d edition, 393.

(u) 3 Term Rep. 763.

the place of the heir, may give the fee as a vested interest, while the other gifts confer an executory interest (y).

And the same gift may have a double aspect, and be good in one contingency, express or implied, although it may be too remote, and void, in another contingency (z).

But in gifts of *proper remainders*, every subsequent gift, after one which is too remote, will also be too remote: and for that reason void.

It is the distinguishing quality of an interest under a good executory devise, that though it may be released or [\*156] extinguished by the act of the owner of that interest, it cannot be barred by any person who has a title under a prior estate or interest of the testator (a).

The instances of executory devises which are annexed to estates-tail, in derogation, or abridgment, or defeasance of such estates-tail, must be excepted. Such executory interests may be barred by the common recovery of tenant in tail, as being interests collateral to the estate-tail.

Mr. *Fearne's* proposition (b), that every executory devise, so far as it goes, creates a perpetuity, that is, an estate unalienable till the contingency be determined one way or the other; and his observation, that it is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatsoever, in the estate out of which, or after which, it is limited, must be read with this qualification (bb).

All conditional limitations owe their effect either to the learning of uses, or of trusts, or of executory devises, as far as these limitations are to have effect, in derogation or abridgment of an estate previously limited.

As tenant in tail may bar the estate-tail, and when he can suffer a common recovery, all remainders expectant on his estate, the law allows of limitations by way of remainder after the failure of issue, or more correctly speaking, \*after the determina- [\*157] tion of an estate-tail; being an estate which may continue till the failure of issue, general or special; for as the estate-tail and the remainder may be barred, there is no danger of a perpetuity.

As a deduction from the same principles, the law, as applied to executory devises, shifting uses, and corresponding trusts, admits of any limitations, to take effect in derogation and abridgment of an estate-tail, without regard to the time at which these limitations are to operate (c). As these collateral limitations may be barred by the recovery of tenant in tail, the danger of a perpetuity is avoided.

Thus, as to executory devises, shifting uses, and corresponding trusts, a limitation to A, and the heirs of his body, remainder to B

(y) *Rogers v. Gibson*, Amb. 93.

(z) *Tracts on Cross-Remainders*, &c.

(a) *Fearne*, 308.

(b) *Ibid.* 315.

(bb) See *Butler's Fearne*, 423, accord.

(c) *Nicholls v. Sheffield*, 2 Bro. Ch. Cas. 215.

in fee ; and if at any time *A* or the heirs of his body shall succeed to a particular farm, then the estate of *A* shall cease, and the lands shall remain to *B*, or to *D* and his heirs, in tail, or in fee, is a good limitation, either by way of executory devise, or springing use, or corresponding trust, though it be not to take effect within the limited period prescribed by the rules against perpetuities. The reason of the decision is, the limitation over is subordinate to an [\*158] estate-tail, and may be barred by a \*common recovery suffered by the tenant in tail.

It is also observable, that a limitation by way of executory devise, or shifting use, or corresponding trust, may be good as to one estate, and void as to another estate\*.

Thus the limitation may be good while the estate-tail is in continuance, and void when the remainder in fee is liberated from the prior estate-tail. As the gift may be barred by the owner of one estate, and therefore, has no tendency to a perpetuity, it is good ; but as it cannot be barred after the determination or failure of the estate-tail, it then has a tendency to a perpetuity, and will be void.

For these reasons, it seems that the common power of sale and exchange in marriage settlements and wills, though not prescribed to be exercised within a given period, is good as to the estates for life, because, as to them the power falls within the limited period ; and also as to estates-tail, because the power may be barred by any tenant in tail ; and is void as to the remainder or reversion in fee, when it falls into possession, or is discharged from the estates-tail ; so that the power will fail when the particular estates, perhaps when the estates-tail, shall determine. This point requires very minute investigation.

[\*159] In these observations, it is assumed, that the \*power is given to be exercised indefinitely, and not to be exercisable within a circumscribed and limited period, falling within the rule against perpetuities.

But some doubts having been entertained by eminent men, and among them Mr. *Fearn*, whether such a power, if indefinite in point of time, would be good, they sometimes added a restriction to this power, requiring that the power should be exercised during lives in being, and twenty-one years from that period.

With the exception which has been noticed, the rule against perpetuities requires that every limitation by way of executory devise, or springing or shifting use, or trusts of a corresponding nature, should be so limited that it may take effect in interest, without regard to the time of taking effect in possession, within the period of a life or lives in being twenty-one years, and the time of gestation ; and this period of gestation is now extended to the commencement, as well as the determination, of the period (*d*).

This rule is adapted to the nature and power of alienation, conferred by limitations of the common and ordinary form usually in-

\* There is not any decision to this effect. (*d*) *Long v. Blackall*, 7 Term Rep. 100.



introduced into settlements; and under which the lands may be limited to *A* for life, remainder to trustees, during his life, remainder to his first and other sons in tail, with remainders over; so that the power of alienation may be suspended \*during the [\*160] life of *A*; or during several lives, if there are several tenants for life, and till the first son of *A* shall be of the age of twenty-one years; and as this first son may be in *ventre sa mère*, at the death of his father, the power may be also suspended during the period of gestation, in addition to the term of twenty-one years; and the law, as already observed, also allows of two periods of gestation, one at the commencement, the other at the end, of the term (e).

The deductions from this rule are,

1st, An interest limited to commence on the indefinite failure of issue of *A*, as a substantive and independent limitation, is void, as too remote in its creation, and as transgressing the period allowed by law.

But a limitation on the failure of the issue of *A*, to whom an estate-tail is given, or in case *A*, the testator's heir, shall die without issue, will be good as a remainder expectant on an estate-tail.

In the latter instance, an estate-tail will be raised to the heir by implication and construction of law.

And sometimes the effect of the limitation over will be to abridge the prior interest, and to convert it into an estate-tail. In this mode the limitation over being of real estates will be good, as a devise to *A* and his heirs for ever; and \*if he shall die [\*161] without heirs of his body, or without issue, to *B* in fee; for *A* has merely an estate-tail.

So if a devise be to *A* and his heirs for ever; and if he shall die without heirs, then to *B* in fee, this devise, though generally speaking, void, as too remote, will be good if *B* should be in the line of succession to *A*, and inheritable to him (ee), or *A* should be a denizen (f), or a bastard; so that the word heirs must (to render the limitations consistent,) be construed as used in the sense of the words 'heirs of the body;' and consequently create an estate-tail.

This exception, however, is not admissible in reference to leasehold or personal estates, unless the interests are, in their nature, circumscribed in duration by lives (g).

So if *B* has an estate-tail, with remainder or reversion in fee to *C*, and *C* devises the lands to *A*, from and after the failure of the issue inheritable to the estate of *B*, this will be a good and present devise of the remainder or reversion in fee; because the words of limitation do, in reference to and as connected with the prior estate, merely designate the time at which the estate is to com-

(e) *Long v. Blackall*, 7 Term Rep. 100.

(ee) *Parker v. Thacker*, 3 Lev. 70; and *Preston's Essay on Estates*, chap. Tail.

(f) 5 Bulstr. 185; 3 Leon. 111, arg.

(g) *Cotton v. Heath*, 1 Roll. Abr. 612; *Gakes v. Chalfont*, Follexf. 88; *King v. Cotton*, 29 F. W. 808; *Ree v. Jeffery*, 7 Term Rep. 596; *Doe v. Lyde*, 1 Term Rep. 887; 3 Atk. 449.

mence in possession; not the time at which it is to com-  
 [\*162] mence in \*interest (g). In effect they pass the imme-  
 diate reversion or remainder. But in this case, the time  
 marked by the particular limitation must, in terms, or in sound con-  
 struction, be that precise time which will cause a determination of  
 the prior estates (h) : For if the prior estate is to determine on the  
 failure of issue male, or on the failure of the issue by a particular  
 woman, or on the failure of issue generally, and the limitation in  
 question is independent of that event, it will be considered as a sub-  
 stantive and independent gift, and therefore too remote (i).

So if a limitation by way of executory devise or shifting use, be  
 merely *for life*, it cannot be too remote ; since in the nature of the  
 case it must fail or take effect within a reasonable period, *viz.* a life  
 in being (k).

So if, from the nature of the property, the interest cannot be too  
 remote, a limitation over will be good in whatever words it shall be  
 expressed.

Thus, if A has an estate for three lives, or for years determinable  
 on the death of three persons, or for three lives and twenty-one  
 years, as in the Liverpool leases ; every limitation of this  
 [\*163] interest by way of executory devise or \*trust, or as to the  
 freehold interest, by way of shifting use, will be good ; and  
 even though there exist a right of renewal, or a tenant-right, the  
 limitation will not, on account of the right of renewal, or on account  
 of the tenant-right, be too remote, and therefore void. At least,  
 such was the opinion of the judges on the argument of *Mogg v.*  
*Mogg* (l), though the point cannot be considered as fully and de-  
 liberately decided.

A limitation which is to wait for effect for any period which may  
 not happen within a life or lives in being, twenty-one years, and the  
 time of gestation, is also too remote, and on that account void.

Thus, under a devise to A for life, remainder to his unborn son  
 in fee ; and if such unborn son shall die under the age of twenty-  
 five years, to C in fee (m), the gift to C is void.

So a devise to the first son of A (not having any son,) who shall  
 be in priests orders, is also void ; for no one can be in *priests orders*  
 by the ecclesiastical laws of this country till he shall be twenty-  
 four (n).

For in one case the limitation might be suspended from giving a  
 vested interest for twenty-five years beyond a life in being ;  
 [\*164] and \*in the other case, for twenty-four years beyond a life  
 in being, and is therefore too remote.

In a case from the court of chancery (o), and not reported, a

(g) *Badger v. Lloyd*, 1 Lord Raym. 523.

(h) *Tenny v. Agar*, 12 East 263.

(i) *Lady Lanesborough v. Fox*, Cases temp. Talb. 262.

(k) *Roe v. Jeffery*, 7 Term Rep. 596, and cases cited at (g) p. 161. *Barlow v. Saller*,  
 17 Ves. 482 ; *Doe dem. King v. Frost*, 3 B. & A. 546.

(l) 1 Merivale, 654.

(m) *Lade v. Hoford*, Amb. 474 ; 3 Burr. 1418 ; 1 Bl. Rep. 423.

(n) *Proctor v. Bp. of Bath and Wells*, 2 H. Black. 358 ; *Leake v. Robinson*, 2 Meri-  
 vale, 363.

(o) Of the name of *Busby v. Saller* and others.

person had a power of appointment in favour of his children. He made a will in exercise of his power. He appointed an aliquot part of the lands to his son in fee, and the other parts to his daughters in fee; and he added a proviso, that the aforesaid directions, &c. were upon the express condition, that, as to the marriage of his children, he directed that the same should be with the privity of his trustees, &c. And in case his son *Edward* should marry without such consent as aforesaid, before he attained his age of twenty-five years, then he should only be entitled to and receive his share, &c. for his own use, &c. for his natural life only, and to the issue of his body lawfully begotten, in such shares and proportions as he should by will or deed direct and appoint.

The judges [*Mansfield, Heath, Lawrence, and Chambre,*] in answer to the question, What estate did the plaintiff *Edward Salter Busby*, namely the son (who married before his age of twenty-five years without the privity and consent of the trustees,) take in one undivided third part of the messuages, lands, and hereditaments in the pleadings mentioned, under the power of appointment contained in the indentures of lease and re-lease of the 19th and 20th January 1770, \* (being the settlement containing [\*165] the power) and the will of the said *Henry Busby*, (the donee of the power, dated 27th November 1788 ?) certified that the plaintiff, *Edward S. Busby*, took an estate in fee in one undivided third part of the messuages, lands, and hereditaments in the pleadings mentioned, under the power of appointment contained in the indentures of lease and re-lease of the 19th and 20th January 1770, and the will of *Henry Busby*. The certificate is dated 27th November 1788.

This certificate must have been grounded on the principle, that such a limitation in the deed creating the power would have been too remote; and therefore was too remote in the will, as an appointment in exercise of the power.

To guard against the possible mischief and inconvenience of a departure from the rules of the common law, by allowing a suspension of the right and power of absolute alienation of the fee-simple, several rules, treated as *rules against perpetuities*, have been adopted by the courts by way of regulation, fixing the limits to executory devices, springing and shifting uses, and trusts of a similar nature.

A gift, or trust, which limits successive life-estates to persons unborn, and to their descendants, is (p) too remote; because it has a tendency to a perpetuity, by suspending the \*owner- [\*166] ship of the inheritance in property held for an estate of inheritance; and the absolute interest in other property, for an unreasonable period.

But in some cases, as in wills, and perhaps in trusts of the executory kind, the courts will, on the foundation of the general inten-

(p) *Samerville v. Lethbridge*, 6 T. Rep. 213: *Beard v. Westcott*, 5 Taunt. 500: *Seaward v. Willock*; 5 East, 198.

tion, construe the gift to the children to be part of the gift to the parent, and give him an estate-tail, corresponding, in measure and extent, with the gift to his issue (p).

Formerly it was understood that a person unborn was incapable of taking an estate for life.

It is now agreed that a person of this description may take such estate; but all limitations over to descendants of such persons, as purchasers, are too remote, and for that reason void; unless the intended words of purchase can, by the doctrine of *cy pres*, be construed as words of limitation, or the nature of the interest excludes the danger of a perpetuity.

[\*167] But the doctrine of *cy pres* is not admitted \*in limitations by deed of the legal estate, nor in limitations even in wills of leasehold or personal estate (q).

Nor is the doctrine of *cy pres* applicable when there is a "single intention," as distinguished from a general intention.

The case of a *single intention* is exemplified in the instance of a gift (r) to A for life, and after him, to his eldest or any other son after him for life, and after him, to as many of his descendants (issue) as shall be heirs of his or their bodies down to the tenth generation, during their natural lives. But it seems to have escaped the judges, that there may be an estate-tail of a limited nature; an estate descendible to heirs of the body for one degree, or in the first line of succession only.

Also, if from the nature of the interest, the successive limitations for life are to have effect within lives in being, and twenty-one years, they will be good although the issue of persons unborn are to have life interests (s).

Several other propositions must be advanced to understand the rule with all its qualifications:

1st, A limitation to the unborn child of a person in being [\*168] is good, whenever the estate \*limited to the child is for *his* life, or gives him an estate of inheritance (ss).

A limitation to a grandchild, or more remote issue, is good, if there be an express provision that the child shall be born within the time limited by the rule against perpetuities (t).

3dly, A limitation to a person unborn, with (u) superadded limitations to his first and other sons, is good, so far as relates to the child, and void, as to his sons, as purchasers; and all limitations over are too remote, unless the child be tenant in tail under the doctrine of *cy pres*.

(p) *Humberston v. Humberston*, 1 Peere Wma. 332; *Hopkins v. Hopkins*, 1 Atk. 593; *Hucks v. Hucks*, 2 Ves. 568; *Spencer v. Duke of Marlborough*, 5 Bro. Parl. Ca. 592; *Chapman v. Brown*, 3 Burr. 1626; *Robinson v. Hardcastle and others*, 2 Term Rep. 241; *Nichol v. Nichol*, 2 Black. Rep. 1159; *Somerville v. Lethbridge*, 6 Term Rep. 213; *Seaward v. Willock*, 5 East, 198; *Hoyes v. Ford*, 2 Black. Rep. 700; *Pitt v. Jackson*, 2 Bro. Ch. Ca. 51; *Beard v. Wastcott*, 5 T.unt. 500.

(q) *Somerville v. Lethbridge*, 6 Term Rep. 213.

(r) *Seaward v. Willock*, 5 East, 198.

(s) *Mogg v. Mogg*, 1 Merivale, 704.

(ss) *Blandford v. Thackerell*, 2 Ves. jun. 238; 3 Term Rep. 87; *Adams v. Adams*, Cowp. 657; 2 Ves. jun. 366; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 582.

(t) 2 Ves. jun. 366.

(u) *Adams v. Adams*, Cowp. 657.

4thly, The time of computation in deeds is from the execution, and in wills, from the death of the testator.

5thly, Estates for life, created in favour of persons to be the children of successive generations, is void as to those who will not necessarily be born within the period prescribed against perpetuities (x).

6thly, There appears to be reason for a difference between remainders, executory devises, and springing uses ; for a remainder after an estate for life to the unborn children of an unborn person, may be good, provided \*that unborn persons do not [\*169] take any estate ; since as a remainder it must vest or fail of effect within the time limited by the rule against perpetuities (y).

7thly, In deeds, all the ulterior limitations which are remote beyond the period allowed by law, are void (z).

8thly, In wills to answer the general intention, the parent, who is the stock of the intended succession, and to whom an estate for life is limited, will take an estate-tail, corresponding with the limitations to his children and their issue, unless chattel interests in the nature of estates for life are limited (a).

9thly, And a power to suspend the right of enjoyment by a person unborn till twenty-five is void (b).

10thly, So is a power to trustees to revoke estates-tail limited to persons unborn, and on their births to limit to them estates for life, with remainders to their children (c).

11thly, A power to appoint in favour of grandchildren, or issue, will be good, though they are not directed to be born within a limited time, so as the person exercising the \*power ap- [\*170] points to persons capable of taking within the rule against perpetuities (d).

12thly, But an actual limitation, by way of executory devise or springing use, to the grandchildren, or issue, being the unborn issue of a child not in being, would, without such restriction, be void (e).

13thly, It should seem that estates may be limited to the unborn child of an unborn child, if the child in the first degree take a special estate-tail, since there is not any danger of a perpetuity (f).

Though a limitation over, after, and expectant on, a limitation which is too remote, is, generally, for that reason, void ; yet, if in express terms the limitation over is to take effect, or to fail within a

(x) *Humberston v. Humberston*, 1 P. W. 332 ; *Beard v. Westcott*, 5 Taunt. 500.

(y) 4 Ves. jun. 681.

(z) *Routledge v. Dorrel*, 2 Ves. jun. 356 ; *Adams v. Adams*, Cowp. 657 ; *Brudenell v. Elwes*, 1 East, 442.

(a) *Humberston v. Humberston*, 1 P. W. 332.

(b) *Somerville v. Lethbridge*, 6 Term Rep. 215.

(c) *Helford and Lade*, Amb. 479 ; *Spencer v. Duke of Marlborough*, 5 Bro. Parl. Ca. 392.

(d) *Hockley v. Mansbey*, 1 Ves. jun. 150 ; *Routledge v. Dorrel*, 2 Ves. jun. 357.

(e) 2 Ves. jun. 357 ; *Baldwin v. Karver*, Cowp. 309.

(f) *Nichol v. Sheffield*, 2 Bro. Ch. Ca. 215.

time to fall within the rule against perpetuities, the limitation over will be good (g).

The next rule is, that whenever one limitation by way of executory devise, or shifting or springing use, is too remote, all other limitations, as far as they are made by way of remainder, and expectant on that interest, are also too remote, and therefore void.

Thus, if a limitation be to one for life, remainder to his first son unborn, for ever; and if such son should die under the age [\*171] of \*twenty-five years, then to *B* in tail, remainder to *A* for life, with remainders over, this limitation to *B* is too remote; and, as a consequence, the gift to *A*, and all the remainders expectant thereon, are also too remote.

But some limitations are with a double aspect: they are to take effect either expressly, or by construction of law, on each or either of two events; and such limitations may be good in one event, though they are too remote in the other event.

Thus, if a term for years be bequeathed to *A* for life, and after his death to his first and other sons unborn, successively, and the heirs of their bodies; and on failure of such issue to *B* for life, and after his death to his first and other sons successively, and the heirs of their bodies, these limitations to *B*, and his first and other sons, as depending on, and to take effect, after the failure of the estates of the first and other sons of *A*, (being merely chattel interests, and consequently not creating estates-tail) are too remote, and therefore void.

But the law foreseeing that there may not be any child of *A*, considers the limitation to *B*, and his first and other sons, as intended to take effect, in the event that there should not be any child of *A*; and it construes the limitations in the same manner as if penned in these terms; and the limitation is good in the alternative, that there shall not be child of *A*. [See Tracts on Cross-Remainders, in the chap. on Contingencies with double aspect.]

[\*172] \*The like conclusion would be drawn if the limitation had been in express terms to operate on either of two contingencies; and it were not too remote in one of these contingencies, though it were void as being too remote in another of the contingencies.

Another rule respecting these executory or future limitations, is, that a limitation that is too remote in its creation, cannot become good in event, even although the event should happen in the life-time of the testator, or within any other period (h).

Another rule is, that a limitation by way of gift to *A*, with a separate gift to the heirs of his body, under which they would take by way of limitation or descent, cannot, by the death of *A* in the life-time of the testator, convert the words, 'heirs of his body,' into

(g) *Crompe v. Barrow*, 4 Ves. jun. 681; *Beard v. Westcott*, 5 Taunt. 500.

(h) *Brett v. Sawbridge, et al.* 4 Bro. Par. Cas. 244; *Goodman and another v. Goodright*, 2 Burr. 878.

words of purchase (i). But a limitation, originally made by way of contingent remainder, as to *A* for life, remainder to the first and other sons unborn of *B* in tail, and which, from a change of circumstances in the life-time of the testator; as the death of *A*, before the birth of a son to *B*, cannot have effect, as a remainder, may have effect as an executory devise. But a limitation once operating as a contingent remainder, can never, after the death of a testator, be changed into an executory devise.

But a limitation, originally taking effect as \*an executory [\*173] devise, may, by a change of circumstances, become a contingent remainder, as to *A* (from and after next Michaelmas) for life, remainder to his first and other sons in tail.

Till Michaelmas the gift operates by executory devise. After Michaelmas, and when the estate of *A* is vested, provided it does vest, the interest of the first son will be a remainder either vested or contingent.

In this place also, it must be observed, that if an estate held for lives be limited by way of strict settlement, and by way of entail, for it cannot in strict propriety, be entailed; as to *A* for life; and after his death to his first and other sons, and the heirs of their bodies; these limitations partake of the nature of remainders; and the *quasi* tenant in tail may, by surrender, lease and release, fine *sur concessit*, and it should seem, (but this is doubtful) (*k*), even by devise, bar the right of his issue, and those in remainder.

A person who has a *quasi* estate-tail in chattel-real or personal estate, is considered as the absolute owner, if the limitation over be to take effect on an indefinite failure of his issue. But if the limitation over be on an event which may happen within the period limited by the rule against perpetuities, this limitation over will be good, and cannot be defeated by any act of the owner, under the prior limitation, except such act is the event, or one of the \*events, by which the limitation over is to be defeated, [\*174] or fail of effect.

Sometimes leasehold and personal estates are settled by way of reference to uses in strict settlement of real estate, or as heir-looms to go with the real estate, as far as the rules of law and equity will permit. The first tenant in tail (*l*) will have an absolute interest on his birth, except there be words which give to a court of equity the power of modifying the trust (*m*), and of suspending the right to an absolute interest, unless the tenant in tail shall attain twenty-one.

It is settled, that when the *quasi* tenant in tail of an estate for lives is seized in possession, he may bar his issue and the remainders; and it should seem he may do this even when his estate is a remainder, after a prior life-estate. This was the opinion of

(i) *Hodgson v. Ambrose*, 1 Dougl. 337.

(k) 1 Vol. p. 402.

(l) *Foley v. Burnell*, Cowp. 435; 1 Bro. Ch. Cas. 274.

(m) *Duke of Newcastle v. Clinton*, 2 Ves. jun. 387; 12 Ves. 218.

Lord *Alvanley*. But there are respectable opinions doubting this point.

This power of alienation was, in all probability, allowed originally with a view to cases in which there existed a tenant-right, so that there might have been a perpetuity, unless there were some means of barring the limitations over.

### 3dly, *As to Trusts for Accumulation.*

Until the statute of 39 and 40 Geo. III. c. 98, *Thellusson's* act, the period prescribed for trusts \*for accumulation was the same as that by which executory devises and shifting uses were regulated. But now by the statute of 39 and 40 Geo. III. c. 98, intituled, "an act to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited," and which received the royal assent on 28th July 1800.

After reciting that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof should be postponed, should be made subject to the restrictions thereinafter contained.

It was enacted, that no person or persons should, after the passing of that act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, should be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, deviser, or testator; or during the minority or respective minorities of any person or persons who should be living, or in *ventre sa mère*, at the [\*176] time of the death of such grantor, deviser, \*or testator; or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce, so directed to be accumulated; and in every case, where any accumulation should be directed otherwise than as aforesaid, such direction should be null and void; and the rents, issues, profits and produce of such property, so directed to be accumulated, should, so long as the same should be directed to be accumulated contrary to the provisions of that act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

With a proviso, (sec. 2,) that nothing in that act contained



should extend to any provision for payment of debts of any grantor, settler or deviser, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settler, or deviser; or any child or children of any person taking any interest under any such conveyance, settlement or devise; or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions should and might be made and given as if that act had not passed.

With a further proviso, (sect. 3,) that nothing \*in that [\*177] act contained should extend to any disposition respecting heritable property within that part of Great Britain called Scotland.

And a further proviso, (sect. 4,) that the restrictions in that act contained should take effect, and be in force, with respect to wills and testaments made and executed before the passing of the act, in such cases only where the deviser or testator should be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of that act.

To understand this act properly it will be necessary to advert to the learning concerning executory devises, future uses, and future trusts; and the rules established against perpetuities, for the purpose of prescribing the boundaries within which these executory devises, future uses, and future trusts, must be confined.

The general rule, as has been shown, is, that any limitation may be made by way of executory devise, &c. so as the same be to take effect within a life or lives in being, including among those lives children then in *ventre sa mère*, and twenty-one years beyond the death of such life or lives, and the time of gestation; so as to allow for the birth of a child in *ventre sa mère*. In short, this rule against perpetuities is framed from an analogy to settlements made on marriage, in which the children of the marriage are generally made tenants in tail; so that the power of aliening the inheritance may be suspended till twenty-one years after the death of the survivor of the persons made tenants for life.

\*Under this rule prescribing the boundaries to limitations [\*178] by executory devise, it was in the power of the owner of the estate to suspend, not only the ownership of the inheritance for the limited time, but also to suspend the right to the intermediate enjoyment, so as to accumulate the income, and add it to the principal, and thus aggrandize the remote issue of the family, at the expense of the present generation, and, perhaps, the two or three succeeding generations.

Availing himself of this rule, Mr. *Thellusson* fixed on the lives of all his sons, and all his grand-sons born in his life-time, or who should be living at his death, or then in *ventre sa mère* (for such seems to be the construction of his will,) as the period during which the income of his immense property should accumulate, for the benefit of those branches of the respective families of his sons, who at the end of that period should answer the description of the heirs male of the respective bodies of these sons; thus dividing his pro-

perty into three parts, and giving one-third part to the family of each son.

The calculation is, that this period of accumulation will continue for seventy or probably eighty years ; and if it should happen that the person then answering the requisite description should be an infant, the accumulation would necessarily continue till that person shall be adult, and this may be for another period of twenty-one years ; so that if this event should happen, every 100*l.* of the fortune of Mr. *Thellusson* will, at the end of a century, be [\*179] increased \*a hundred fold ; and during all that time the increase will be withdrawn from all the useful purposes of commerce ; and the right of absolute alienation will be suspended.

This will being considered as an abuse of the rule of law, and a contrivance to avoid its principle, though it kept within its letter, the act in question was passed as a protection against attempts of a similar nature.

It must be observed, that the act does not in any manner affect the rule respecting the settlement of the property, as property, or the principle itself ; but it merely regulates the extent to which the income may be accumulated.

Instead, therefore, of its being left to the power of a party to create a trust for accumulation during lives in being, and twenty-one years, and the period of gestation (as he might have done at the common law,) he is now restrained, except in particular cases, from creating a trust for accumulation to continue for any further period than,

1st, During his own life :

2dly, For twenty-one years from his own death :

3dly, During the minority of any person living at his death, or then in *ventre sa mère* :

4thly, During the minority of any person who for the time being would be entitled to the rents, &c. if of age.

1st, He is at liberty to select any one or more of these [\*180] periods for the purpose of \*accumulation ; or he may adopt each of them, if such be his wish ; but all inconvenience is avoided by these different restrictions ; for, in the first place, no just policy could restrain a man from saving his income, instead of spending it, during his life.

2dly, The trust for accumulation during twenty-one years certain from his death is the only period which can be considered as a direct accumulation ; but this period seems to have been allowed merely to take away the encouragement of giving to an infant, rather than to an adult ; as an option of adopting a definite and precise period of accumulation during the utmost period of minority, instead of a gift to an infant, as a means of obtaining the right to accumulate.

3dly, The right to accumulate during the minority is founded on the idea, that if the minor had the beneficial ownership, the income, &c. except as far as was necessary for maintenance, would accu-

mulate during the minority ; so that no more is done by the party under this power of accumulation than would be done under the rules of law, if such power of accumulation was denied to him.

But as this provision may be made as well during the minority of a stranger, as during the minority of any person to whom the property is limited, it is considered with reference to a stranger, merely as an alternate or concurrent right to that of accumulating for a direct period of twenty-one years ; since, if both periods were named, they necessarily must be concurrent.

\*4thly, This provision is founded on the same principle [\*181] as the former. Indeed no difference can be traced in the two provisions, except that one is for the minority of a person living at the death of the settler, &c. while the other is for the minority of any person who may afterwards become entitled to the estate, &c.

The exceptions are,

1st, To provisions for payment of the debts of the grantor, settler, or devisor, or the payment of the debts of any other persons ; and this trust cannot be considered as a trust for accumulation. Instead of saving the income for persons not ascertained, it gives the income to creditors in discharge of the debts owing to them, and thus places the income in a channel in which it may have circulation ; so that in fact the income is given to the creditors, which, as far as the policy of the law is concerned, is full as beneficial as if it were given to any of the family of the settler, and even more beneficial than if it were so given.

2dly, To provisions for raising portions for any child or children of any grantor, &c. or of any person taking any interest under any such conveyance, &c. This exception seems to have proceeded, in a great degree, on the same principle as the former exception, with the additional circumstance, that the nobility, &c. must have disposed of their landed property to raise portions for their younger children, or the children of those for whom they were providing, unless \*they were left at liberty to [\*182] make this provision by a trust of accumulation ; but this exception admits of a latitude which may be productive, in a great degree, of all the inconveniences which were felt or apprehended under the rules of the common law ; because by a will or settlement artfully prepared, every purpose aimed at by Mr. *Thellusson* may be accomplished.

3dly, To provisions or directions touching the produce of timber or wood.

This exception was probably added partly to encourage the growth of timber ; but principally on the ground that a long period of time must elapse before timber can arrive at its maturity ; also, that timber is considered by the generality of owners of estates merely as a resource for some particular occasion ; as a provision for the portions of children, for payment of debts, and the like, and not as a source of income ; so that any direction concerning

timber, and circumscribed within the rule against perpetuities, cannot be considered as withdrawing from the owner for the time being any part of the income of the estate.

Besides, by the rules of the common law, as well as the law of this day, the owner for the time being, unless he be the owner of the inheritance, has not any power over the timber, except for repairs, &c. unless that power be expressly given by the settlement under which he becomes the owner for a limited time.

[\*183] In future, whenever a trust for accumulation \*shall be attempted, care should be taken to keep in view the different periods of limitation marked by the statute, and, in the most explicit and definite terms, to steer within the boundaries marked by the statute, and also to keep within the rule against perpetuities. An excess in the limits of time for accumulation will, in the whole or in part, render the trusts for accumulation void; and any transgression of the rule against perpetuities will render the gift itself void. But if *several periods* of accumulation are fixed, and they are distinctly marked, some may be good, and the others void.

It is now decided, that in a case falling within the statute, the time of accumulation, though entire, may be apportioned, so that part of the trust may be sustained, though part, as contrary to the statute, may be void (n).

In *Southampton v. Marquis of Hertford* (o) the whole trust for accumulation failed, as contravening the rules of the common law.

And in *Leake v. Robinson* (p), Sir W. Grant, M. R. observed, "Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this

[\*184] case it can, be clearly \*ascertained; but the law is otherwise settled. In the construction of the Act of parliament passed after the *Thellusson* cause, I thought myself at liberty to hold that the trust of accumulation was void *only for the excess* beyond the period to which the act restrained; and the Lord Chancellor afterwards approved of my decision. But there the act introduced a restriction on a liberty antecedently enjoyed; and therefore it was only to the extent of the excess that the prohibition was transgressed; whereas executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits. If the condition be violated the whole devise is held to be void."

In *Marshall v. Holloway*, before the Chancellor in June 1818, the distinction between the several cases was urged to the court. [That case is now reported (a).]

(n) *Griffith v. Vere*, 9 Ves. 127; *Longdon v. Simson*, 12 Ves. 295.

(o) 2 Ves. & Beames, 54; *Phipps v. Kelynge*, there cited.

(p) 2 Merivale, 389.

(a) 2 Swanson, 432.

*Tenants of absolute Estates.*

THE tenant of an absolute estate has an interest which is not subject to any condition. The word absolute is a term for distinguishing his interest from that of a person who has a contingent, executory, or conditional interest. And an interest, which originally was conditional, or contingent, executory or defeasible, may, by a performance, or, as to vested interests, [\*185] \*by a release of the condition, or the like, eventually become absolute or indefeasible.

*On Titles under conditional Estates.*

A distinction must be made between,

1st, Persons who are to take on a condition :

2dly, Persons who have an estate subject to a condition.

3dly, Persons entitled to the benefit of a condition.

Conditional limitations are part of the substance of the gift.

1st, Persons who take on a condition are persons having contingent or executory interests. Such persons cannot convey at law ; they, however, may for a valuable consideration transfer their interests in equity (p). Such interests are also descendible and transmissible ; or they may be devised, or extinguished by release, or bound by estoppel.

2dly, Persons who have an estate subject to a condition may convey, &c. In short, they have the same seisin or ownership as other owners, subject only to the condition which gives a collateral quality to their estate, and renders the same defeasible. Their estate will continue defeasible till the condition shall be performed, or released, or discharged by becoming impossible, &c. &c.

\*The title must always be considered as subject to the [\*186] condition, till the condition shall have been performed or re-leased, or till a right of entry shall have accrued, and that right shall be barred by the statute of limitations, or by nonclaim on a fine.

3dly, Of the persons entitled to the benefit of the condition.

By the common law, a condition could not be reserved to any one except the grantor or his heirs, as to real estate, and to the grantor or his executors as to chattel interests.

By the statute of 32 Henry VIII. c. 34, assignees of the reversion, subject to leases, &c. are enabled to take advantage of conditions annexed to leases for years or for *lives* ; and by the bankrupt laws, the assignees under a commission of bankrupt are enabled to perform conditions reserved to the bankrupt.

The person entitled to the benefit of a condition to defeat the fee has no devisable interest. After a grant in fee he will not have

(p) *Wright v. Wright*, 1 Ves. sen. 410.

any estate till the condition shall be broken, &c., and he shall have restored his estate by entry or by action. He may extinguish his right by making a feoffment, or levying a fine to a stranger (q); or he may re-lease his right to the person who has the estate subject to the condition. He may also confirm an estate made by the person who is in the seisin; and thus give stability as against [\*187] himself, his heirs, &c. to the estate conveyed to \*that person. Twenty years, except in cases of disability, and in that case, ten years after the disabilities are removed, seem to be the period within which a right of entry under a condition must be prosecuted. Cases of this sort are governed entirely by the enactment of the statute of 21 James I.

Thus it will be collected, that conditional estates are of two descriptions :

1st, Estates which are to commence on a condition precedent :

2dly, Estates which are to be defeated by a condition subsequent.

In the former instance the condition is properly a contingency. It forms part of the limitation of the estate; and the gift is properly called a conditional limitation; in other words, a limitation on a contingency.

These contingencies relate to the *commencement* of the estate; and, in proportion as the fact or event may be material to the title, particular care should be taken that the event on which the estate was to commence has happened according to the true construction of the words; and that it happened at such period as is requisite to support the title; and in the instance of contingent remainders, before the determination of the prior estate of freehold by which it was supported; and that in reference to the learning of springing and shifting uses, and executory devises, the gift was not exposed to the objection of being contrary to the rules of law against perpetuities.

[\*188] \*All conditional limitations of freehold interests must necessarily be either contingent remainders, springing or shifting uses, or executory devises, except, perhaps, the single instance of an estate for years to be enlarged on condition; being a mode of gift known to the common law, and sanctioned by its rules.

Interests which are subject to a condition to defeat the same may be vested, subject only to be divested, and defeated by the condition. The condition is unconnected with the commencement of the estate, and relates wholly to the means by which the estate may be defeated.

Interests of this description are properly called estates subject to a condition. They arise from a limitation, or gift, with a condition annexed or superadded to the estate; and forming, either in fact or in construction of law, a distinct clause; so that there is in the

first place a limitation of the estate, and secondly a condition to defeat the estate. It would be altogether inaccurate to term a gift attended with these circumstances a conditional limitation.

Provisoes in common-law grants, that the estate shall on some event be void, partake of the nature of conditions, and are classed amongst conditions ; but provisos of cesser in conveyances to uses are subject to some rules inapplicable to conditions at the common law.

At the common law, no one except the grantor, or his heirs, as to real estate, or his \*executors or administrators, [\*189] as to chattel interests, could take advantage of a condition (r).

And when a condition is annexed to a particular estate, and a remainder is limited, the limitation of the remainder is, to the extent of that estate, a discharge or avoidance of the condition ; because it disables the grantor or his heirs to take advantage of the condition (s).

But in conveyances to uses, a proviso of cesser may have, and frequently has, the effect to defeat the estate for the benefit of those in remainder ; thus accelerating the right to the possession under the title conferred by the remainder.

This is the scope of the common clause of provisos of cesser annexed to terms for years in marriage settlements ; and clauses for the cesser of an estate, on refusal to take a name, or bear arms, or on the accession of another estate ; though, in the latter instance, a clause of limitation over for the benefit of those in remainder is generally added.

Provisoes of shifting use, and also of executory devise which are to defeat a prior estate, partake partly of the nature of conditions, and partly of the nature of limitations (t). But they are rather considered as limitations, since they defeat the prior estates for the benefit of strangers ; and the limitations over operate by way or in the nature of gifts of remainders ; \*but these [\*190] interests do not properly fall under the denomination of remainders.

The more leading rules respecting common-law conditions, are,  
1st, The condition must not be repugnant to the estate :

2dly, It must not be insensible, nor impossible :

3dly, It must not be to do an act which is *malum in se*, as to commit felony, &c. (tt) :

4thly, It must defeat the whole estate, and not a part of it ; but it may defeat an estate in part of the lands ; leaving the other parts of the land unaffected by the condition ; while conditional limitations may defeat part of the estate, as occurs in the cases of leases

(r) Litt. § 347 ; 1 Inst. 214 ; Preston's *Shep. Touch.* 116. 146.

(s) Dr. *Butt's* case, 10 Rep. 41.

(t) Preston's *Essay on Estates*, introductory chapter.

(tt) Preston's *Shep. Touch.* 129.

under powers, jointuring powers, and executory devises, which defeat the estates partially:

5thly, A condition must not be to take effect on the event which is to determine the estate; for this is the province of a limitation, and not of a condition (u):

6thly, A common-law condition must be reserved to the grantor or his heirs, &c. At the common law an assignee could not take advantage of a condition. Nor could a condition have been reserved to him with effect, even though he had the reversion in respect of which the condition was to be exercised.

But now, by the statute 32 Henry VIII. c. 34, as-  
[\*191] signees taking a reversion on a particular \*estate, to which conditions are annexed, may take advantage of these conditions. This statute extends to assignees of *part* of the estate, but not to assignees of *part* of the land (x). Hence a disadvantage in the subdivision of lands in the same lease, on a sale thereof in parcels:

7thly, At the common law no remainder can be limited so as to enable the grantee to take advantage of the condition annexed to a prior estate. And a remainder limited at the common law, on the event expressed in the condition which is to defeat the estate, is, in effect, to reserve the condition to a stranger, and this, as has been shown, is not allowed by the rules of the common law.

But even by the rules of the common law a remainder may be limited, to commence on that event which is to cause the *actual* determination of the particular estate, and forms part of the limitation. As to *A* and his assigns, till his return from Rome, and after his return from Rome, then to *B*. This is a good contingent remainder (y).

Also, by way of executory devise, or shifting use, an interest may be limited to commence on the event which is to defeat a prior gift, or estate. But this is allowed under those rules which are proper to executory devises and shifting uses.

[\*192] The like indulgence is also allowed to \*limitations by way of trust. In short, whatever may be accomplished by way of executory devise, or springing or shifting use, may be accomplished through the medium of a trust, considered as a trust.

A material part of the clause of condition is its conclusion, viz. the part which confers the right of entry, or declares that the estate shall, on the given event, be void; for a clause cannot (z) operate as a condition, unless it has proper words of termination. The cases of condition, by construction of law, as conditions annexed to offices; the conditions annexed by law to particular estates

(u) *Preston's Essay on Estates*, introductory chapter.

(x) 1 Inst. 215.

(y) 1 Fearn, p. 3; 3 Rep. 20 a; *Arton v. Hare*, Poph. 97.

(z) Except as to terms for years; *Preston's Shep. Touch.* chap. Conditions.



under which they may be forfeited, do not contravene this doctrine.

The doctrine of conditions is particularly important to the conveyancer. It embraces a large portion of learning with which it is his duty to be intimately acquainted.

He must make himself conversant with the distinctions between negative and affirmative conditions; between conditions which give a right of re-entry, and those which declare the estate to be void; between conditions annexed to estates of freehold, and conditions annexed to chattel interests; between conditions in the disjunctive, and conditions in the conjunctive; and, above all things, he must carefully distinguish between conditions precedent; in other words, conditional limitations, in conveyances at the common law, and in wills, \*and declarations of use, &c. [\*193] and conditions subsequent; in short, those clauses which are properly called conditions.

He must again also distinguish between conditions, properly so called, and which will have, or may have, the effect to defeat the estate; and agreements for redemption, which are frequently mere agreements to re-convey, and not conditions in the technical sense of that term. The title to the legal estate may frequently turn on this distinction.

He should also learn that some conditions are void in their inception, *because they stipulate for that which is impossible*; as, to A in fee, subject to be void if he should go from London to Rome in one hour;

Or that *which is repugnant to the language of the grant*; as, that a man who is a lessee to him and his assigns shall not assign;

Or that *which is repugnant to the estate*; as, that a tenant in tail shall not suffer a common recovery;

Or that *which is illegal*; as, a gift to A in fee, subject to be void unless he shall commit a felony;

Or that *which is against the policy of the law*; as, an unreasonable restraint on trade; on marriage; on the power and right of alienation; or a stipulation for that which is immoral.

As the grant was to the lessee and his assigns, the condition which restrained his assignment generally, was repugnant.

Had not the grant \*been to his assigns; or had the restraint [\*194] been on assignment without consent or license, or on assignment to particular persons, or to any person, except particular persons, the condition would have been good; because there would not have been any repugnancy between the grant and the condition.

Though a condition, which restrains tenants in fee from all power of alienation, or tenant in tail from suffering or attempting to suffer a common recovery, is void, yet tenant in fee may be restrained from aliening to particular persons, &c.; and tenant in tail may be restrained from making a wrongful and tortious alienation; as a discontinuance not being a bar.

So a condition which, for a consideration restrains a person from carrying on trade within a certain reasonable district ; or which restrains marriage to a particular person, or under a given age ; or to a person of a given country, as Scotland ; will be a valid condition.

Again, other conditions, though good in their creation, become void by reason that the act required to be done or omitted is rendered impossible by the act of God ; or by the act of the party entitled to the benefit of the condition, &c.

Whenever a condition is material to the title, care should be taken that it has been either dispensed with (z), or that it has [\*195] been \*re-leased, or has been performed, or has failed of effect ; or that the circumstances of the title afford a presumption that the condition is discharged.

The length of time which has elapsed often renders such presumption irresistible ; because the fact does not admit of any investigation which would lead to a moral certainty.

In regard to conditional limitations, care should also be taken that the event has happened on which the estate was to commence ; or, as the circumstances of the case may require, that the event on which an estate was to arise has failed.

And as to terms for years, whenever it is alleged that the proviso of cesser has operated to defeat the estate, it should be seen that some or one of the events, designated by the proviso of cesser, has happened ; and that the event alleged to have taken place falls within the scope and true construction of the words of that proviso. This point requires more attention than is usually bestowed on it.

Titles involved with conditions to defeat the estate, also require this further consideration :

When the condition shall operate it will defeat the estate in all the lands subject to the condition, and all the derivative estates and interests carved out of the estate of the grantee, or other person to whose estate the condition was annexed (a).

[\*196] \*Thus a purchaser or owner of part of the lands may have the estate defeated by the act or default of the owner of other part of the lands.

And an under-lessee, &c. may have his estate defeated by the act or default of the original lessee, or his assignee. Hence the caution, frequently necessary, in investigating titles under leases when there is a subdivision of property by assignments to different purchasers, or by under-leases of distinct parcels.

In these particulars there is a difference between an express condition and a condition in law ; for if a lessee for life or years surrender his estate, or makes a tortious alienation, by which he forfeits that estate, his surrender or forfeiture will not implicate those who have estates or charges derived under his title.

(z) *Dumport's case*, 4 Rep. 120.

(a) *Preston's Sheep. Touch.* 151.

Thus, if lessee for life make a lease for years, and after enter on the lessee, and make a feoffment, this forfeiture will not prejudice the lessee for years (b).

Hence the observation of Lord Coke, "And it is to be observed, that a condition in law, by force of a statute which giveth a recovery, is in some cases more strong than a condition in law without a recovery. For if lessee for life make a lease for years, and after enter into the land, and make waste, and the lessor recover in an action of waste, he shall avoid the lease before the waste done. But if \*the lessee for life make a lease for years, [\*197] and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for years. Nor, in any of the said cases, a precedent rent granted out of the land shall be avoided; for if lessee for life grant a rent-charge, and after doth waste, and the lessor recovereth in an action of waste, he shall hold the land charged during the life of the tenant for life; but if the rent were granted after the waste done, the lessor shall avoid it."

"And the reason wherefore the lease for years in the case aforesaid shall be avoided, is, because of necessity the action of waste must be brought against the lessee for life, which in that case must bind the lessee for years; or else by the act of the lessee for life the lessor should be barred to recover *locum vastatum*, which the statute giveth."

"If a man hath an office for life which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his office, the rent-charge shall not be avoided during his life [qu. if the conclusion be law]; for regularly a man that taketh advantage of a condition in law shall take the land with such charge as he finds it. And therefore *Littleton* (c) is to be understood that a condition in law is as strong as a condition in deed; as, to avoid the estate \*or interest itself, but not to avoid precedent charges, but in some particular cases, as by that which hath been said, appeareth." The general doctrine is further elucidated in 1 Inst. 338 a.

Whoever wishes to understand the doctrine of conditions thoroughly, according to the rules of the common law, with all the various important distinctions which belong to this subject, will do well to read the chapter on Conditions in Comyns's Digest, and in Shep. Touchstone, chap. Conditions; 1 Inst. chap. Conditions.

### *Of Tenants under Defeasible Estates.*

ESTATES may be defeasible either by reason of a condition, or a conditional limitation annexed to the estate, or a defect in the title under which there may exist a right of entry, or of action, in some other person.

(b) *Preston's Shep. Touch.* 151; *infra*, 199.

(c) § 378.

Titles of this sort must be considered as defective till the defect shall be supplied, or the right of entry, or of action, shall clearly and unquestionably be barred by non-claim on a fine, or under the statute of limitations, or, as to equitable interests, by the rules which courts of equity have adopted in analogy to the statute of limitations; or until the defect shall be removed by a re-lease, or confirmation, or some other assurance having that effect, from the persons in whom the right or title resides, and who are [\*199] competent, in point of interest, \*and also of age and personal qualifications, to give such confirmation or re-lease.

Titles under derivative estates are of the same description. They are governed by the rule *cessante statu primitivo cessat derivativus*.

This rule, however, must be understood with its proper qualifications. Some of these qualifications have already been stated; others of them will be found in the following quotation from Lord Coke (d):

"It is holden of some, that after the surrender" [by a tenant for life to the husband, seised in tail in right of his wife, and who discontinued the tail;] "the issue in tail during the life of the tenant for life may enter; for that having regard to the issue the state for life is drowned, and consequently the inheritance gained by the lease is, by the acceptance of the surrender, vanished and gone; as, if tenant in tail make a lease for life, whereby he gaineth a new reversion, as hath been said; if tenant for life surrender to the tenant in tail, the estate for life being drowned, the reversion gained by wrong is vanished and gone; and he is tenant in tail again, against the opinion *obiter* of *Portington*, 21 H. VI. 53.

"But herein are two diversities worthy of observation; the first is, that having regard to the parties to the surrender, the estate is absolutely drowned, as in this case, between the lessee and the second baron.

[\*200] \*"But having regard to strangers who were not parties or privies thereunto, (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender,) the estate surrendered hath, in consideration of law, a continuance; as if a reversion be granted with warranty, and tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger, during the life of tenant for life; for this surrender shall work no prejudice to the grantor who is a stranger.

"So if tenant for life surrender to him in reversion, being within age, he shall not have his age; for that should be a prejudice to a stranger, who is become demandant in a real action.

"If tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he cometh in under the charge, *causâ quâ supra*.

"If a bishop be seised of a rent-charge in fee, the tenant of the land enfeof the bishop and his successors; the lord enter for the mortmain, he shall hold it discharged of the rent; for the entry for the mortmain affirmeth the alienation in mortmain, and the lord claimeth under his estate; but if tenant for life grant a rent in fee, and after enfeof the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claim above the feoffment. But if I grant the reversion of my tenant for \*life [\*201] to another for term of his life, and tenant for life attorn, now is the waste of tenant for life dispunishable. Afterwards I release to the grantee for life, and his heirs, or grant the reversion to him and his heirs, now albeit the tenant for life be a stranger to it, yet because he attorned to the grantee for life, the estate for life which the grantee had shall have no continuance in the eye of the law, as to him, but he shall be punished for waste done afterwards.

"The second diversity is, that for the benefit of an estranger the estate for life is absolutely determined; as if he in the reversion make a lease for years, or grant a rent-charge, &c. and then lessee for life surrender, the lease or rent shall commence *maintenant*. So in the case of *Littleton*, first, between the lessee and the second husband, the estate for life is determined; and secondly, for the benefit of the issue, it shall be so adjudged in law. Here note a diversity, when it is to the prejudice of a stranger, and when it is for his benefit.

"If a man maketh a lease to *A* for life, reserving a rent of forty shillings to him and his heirs, the remainder to *B* for life, the lessor grant the reversion in fee to *B*; *A* attorn, *B* shall not have the rent; for that although the fee-simple do drown the remainder for life between them, yet as to a stranger it is in *esse*, and therefore *B* shall not have the rent, but his heir shall have it," namely, as annexed to the reversion.

## \*Possibilities.

[\*202]

BECAUSE the owner of an executory interest has, while the interest remains executory, no estate, he cannot grant or assign at law (f).

There is one exception to this rule. The owner of an *interesse termini* may assign his interest in the term. But a person whose term is turned into a right of entry cannot assign the term till he has restored his estate by his entry (g).

Of course, when the owner of an executory interest affects to assign that interest, the title, though it may be good in equity, will be defective at law, supposing the interest to be legal; and a further conveyance must be taken after the interest is executed; or a re-lease must be made to the person in whose favour an effectual re-lease may be taken.

(f) 10 Rep. 50; 4 Rep. 66 b; 1 Inst. 206 a. (g) *Stephens v. Herman*, 5 Lev. 312.

In this particular, executory and contingent interests stand on the same footing ; and the observations made with reference to the interests of one description are equally relevant to the interests of the other description.

To sum up the material distinctions applicable to the owners of contingent interests ; they may re-lease them by deed, except in case of entails, or *femes covert*. In case of entails or [\*203] *femes covert* the release must be by fine ; and \*in the case of entails the fine must be with proclamations. A married woman may also re-lease by common recovery.

A common recovery, suffered by a person who has a contingent interest in tail, will be good to bind himself ; but it will neither bar his issue, nor those in reversion or remainder.

Contingent interests in fee, or contingent interests, except entails, are devisable ; they may also be bound by estoppel (*h*), or they may be bound in equity by contract.

But there are two species of estoppel, as will afterwards be noticed, one which gives an interest ; the other which extinguishes a right :

Of the former description are grants by estoppel for terms of years ; of the latter description are estoppels which apply to the whole interest.

In the instance of terms for years, the interest will be bound when it vests. In the case of other interest the right will be extinguished (*i*).

It is therefore particularly important that a person who has a contingent interest in tail, or in fee, should carefully avoid the levying a fine, &c. or making a feoffment, unless there be an intention to extinguish the right to the inheritance. For the fine, feoffment, &c. will have the effect to extinguish the inheritance whatever may be the intention of the parties.

[\*204] But here we must distinguish between \*contingent interests of the legal, and contingent interests of the equitable, ownership.

Interests of the latter description, instead of being extinguished will be transferred, when such is the intention, notwithstanding the fine, &c. would, under similar circumstances, have extinguished the right to a contingent interest of the legal estate.

#### *Titles under Possibilities, &c.*

TITLES under possibilities and expectancies are of two descriptions :

- 1st, Possibilities coupled with an interest :
- 2d, Possibilities without any interest.

A person who is *ascertained*, and who may take under the gift of a contingent or executory interest, or even under a condition an-

(*h*) *Weale v. Lower*, Pollexf. 54.

(*i*) *Ibid*.

nexed to a fee, or who has a *possibility of reverter* on a grant of a determinable fee, has a possibility of this nature.

Such possibility may be re-leased, though it cannot be granted. It may be extinguished by fine, &c. by estoppel. In most cases it is a devisable interest (*k*).

But a right to enter for a condition broken, or under the warranty annexed to an exchange (*l*) ; or the benefit of a condition, unless it be annexed to a reversion, is not devisable ; and, perhaps, a mere possibility of reverter is not devisable.

\*These possibilities or expectancies which are not cou- [\*205]  
pled with an interest, are not devisable or releasable ; but all title under them may be excluded, or bound by estoppel.

Of this description are the expectancies of an heir apparent, or an heir presumptive ; or of persons, when the gift is to the survivor of them, and both are living ; also of persons who are to take under a gift to a class of persons not ascertained, as children who shall attain twenty-one, children who shall survive their parents, &c. (*m*).

But persons who may eventually become entitled under these or the like gifts may bind themselves in equity by contract for a valuable consideration (*n*).

Titles under estoppels will fall very properly under consideration in this place.

### *Of Estoppels.*

An estoppel precludes the rightful owner from asserting his title.

Estoppels are of different sorts, and, to avoid confusion, they must be accurately distinguished.

There are estoppels,

1, In pleading :

2, In evidence :

3, In extinguishment of rights, &c. :

\*4, Binding by acceptance :

[\*206]

5, Which give a title against the rightful owner.

Estoppels in pleading do not fall within the scope of this work.

Estoppels in evidence preclude the party from giving any evidence contrary to an admission of the fact by *recital*, &c. Thus, if a bond recite a fact, and then the bond has a condition to do or omit some act, in reference to the fact, the truth of the fact cannot, at law, be controverted, though, as a general rule, a recital is no estoppel.

(*k*) *Roe and Jones*, 1 Hen. Blackst. 30. (*l*) *Attorney General v. Vigor* 8, Ves. 256.

(*m*) See *infra*.

(*n*) *Wright v. Wright*, 1 Ves. 409 ; *Bickley v. Newland*, 2 P. Wms. 122.

*Estoppels in Extinguishment of a Right.*

In *Buckler's* case (o) it was resolved, that "if disseisee levy a fine to a stranger, in this case the disseisor shall hold the land for ever ; for the disseisee against his own fine cannot claim the land, and the conusee cannot enter, and [the] right which the conusor had cannot be transferred to him ; but by the fine the right is extinct, whereof the disseisor shall take advantage."

And Lord *Hale* observed (p), that fines and feoffments do ransack the whole estate, and pass or extinguish, &c. all rights, conditions, &c. belonging to the land, as well as the land itself.

Some gentlemen are inclined to entertain doubts of the soundness of the decision in *Buckler's* case.

[\*207] \*Though the point was questioned in *March* Rep. 106, yet there is such a volume of concurring authority in support of the resolution, that no lawyer investigating the subject can reasonably doubt on the point. The case of *Weale v. Lower* (q), and *Moore's* case (r), go the whole length of this resolution.

The doctrine of estoppels by fines, &c. is confined to legal rights, and does not extend to equitable rights or titles ; except when there is an intention to extinguish the right or title.

It is clear that contingent executory interests may be bound by estoppel ; as to legal interests without any intention ; and as to equitable interests, when there is an intention of binding the interest.

*Mere strangers* to the fine, or other record, may take advantage of the estoppel as to legal interests, rights and titles (s) ; but as to equitable interests, rights and titles, the fine, &c. can be used only as a species of re-lease, or other assurance.

*As to Estoppel by Acceptance.*

By accepting a lease by indenture, the person who is named lessee is precluded from denying the existence or validity of the lease. The plea of *nil habuit in tenementis*, is admissible on his part, or by his executors, administrators or assigns.

[\*208] \*So if two persons are joint-tenants in fee, and they accept a fine to them, and the heirs of one of them, this is an estoppel against their right to contend that they have the fee in joint-tenancy (t).

The joint-tenancy is in general practice restored by a declaration of the uses declared of the fine.

As to estoppels which give a title against the *rightful* owner :

Estoppels of this description conclude future rights when they are acquired ; and they are binding on,

(o) 2 Rep. 56. (p) *King v. Melling*, 1 Ventr. (q) Pollaxf. 54. (r) *Palmer*, 365.  
(s) *Buckler's* case, 2 Rep. 56. (t) *Shep. Abrid.* 2 pt. 85.



- 1, The parties :
- 2, Privies in blood, as heirs :
- 3, Privies in representation, as executors :
- 4, Privies in estate, as feoffee, lessee, &c.
- 5, Privies in law, as lord by escheat ; tenant by curtesy ; in dower ; incumbent of a benefice ; and they and others that come in by act in law, and in the *post*, shall be bound [by] and take advantage of estoppels ; and a *rebutter* is a kind of estoppel (u).

Married women and infants may bind themselves and their heirs by estoppel (x).

The rules respecting estoppels are collected in 1 Inst. 352 a.

The only rules which apply to the points now under consideration, are,

\*1st, Every estoppel ought to be reciprocal, that is, to [\*209] bind both parties.

2dly, Every estoppel, because it concludeth a man to allege the truth, must be *certain to every intent*, and not to be taken by argument or inference. The rule is applicable to recitals and pleading.

3dly, Every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not to be spoken impersonally, as, if it be said, *ut dicitur, quia impersonalitas non concludit, nec ligat : impersonalis dicitur quia sine persona* ; neither doth a recital conclude, because it is no direct affirmation. But a recital in a deed may be evidenced, and may, in some cases, conclude, as in the instance of a condition of a bond, when the condition is founded on a recital.

Estoppel against estoppel doth put the matter at large.

Where the verity is apparent in the same record, or in an indenture of lease (y), there the adverse party shall not be estopped to take advantage of the truth, for he cannot be estopped to allege the truth, when the truth appeareth of record, or in the indenture.

Where the record of the estoppel doth run to the disability or legitimation of the person ; there all strangers shall take benefit of that record.

\*But if a record concerning the name of the person, [\*210] quality, or addition, no stranger shall take advantage, because he shall not be bound by it (z).

There are other rules collected (a), but they are not inserted, since they relate exclusively to the learning of pleading and evidence.

The general rules, in reference to the power of alienation, are, as it has been shown, *qui non habet, ille non dat* ; and *nemo potest plus juris in alium transferre quam ipse habet*.

The learning of estoppels and of warranties affords exceptions to these general rules. Though a stranger, or an heir apparent, or a presumptive heir, cannot grant as such (b), yet he may, by estop-

(u) 1 Inst. 352 b.

(x) Bro. Abr. Estoppel, pl. 28.

(y) *Hermitage v. Tomkins*, Lord Raym. 723.

(z) 1 Inst. 352 b.

(a) 1 Inst. 352 a b.

(b) *Wiseell's case*, Hob. 45.

pel, bind any interest which he may afterwards acquire ; and a man may, by accepting a lease under a stranger, by indenture, bind himself to be treated as his tenant, and to pay rent, while the term imported to be granted by the lease shall have continuance (c).

But different assurances will have different operations by way of estoppel ;

1st, An *indenture* of lease, or a fine *sur concessit*, for years, will be an estoppel only during the term. It first operates by [\*211] way of estoppel, and finally, when the grantor obtains \*an ownership, it attaches on the seisin, and creates an interest, or produces the relation of landlord and tenant ; and there is a term commencing by estoppel, but for all purposes, it becomes an estate or interest. It binds the estate of the lessor, &c. and therefore continues in force against the lessor, his heirs, &c. It also binds the assignees of the lessor and of the lessee. On this subject *Bacon* has a very correct and comprehensive statement of the law (d).

As to *feoffments* ;

A feoffment by a person who is not the owner, passes of necessity a fee by wrong or disseisin.

It binds the feoffor for his life by estoppel ; so that he never can claim the right, though it should descend to him, in opposition to his own feoffment. He cannot purchase the fee, since his feoffment is a disseisin. But the feoffment is an estoppel only to him *personally* ; it will not bind his heirs by its proper operation ; on the contrary, as Lord *Coke* observes (e), “ There is a diversity between a warranty and a feoffment ; for if there be a grandfather, father, and son, and the father disseiseth the grandfather and make a feoffment in fee, the grandfather dieth ; the father against his own feoffment shall [\*212] not enter ; but if he die, his son shall enter. And \*so note a diversity between a re-lease, a feoffment, and a warranty. A release in that case is void ; a feoffment is good against the feoffor, but not against his heir ; a warranty is good both against himself and his heirs.

And if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors *re-lease* all their right and title in the land to the heir, this is void ; for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton's* case of a re-lease of right ; and so it is, if *cestui que use* had devised that his feoffees should have sold the land, albeit they had made a *feoffment* over, yet might they sell the use, for their authority in that case is not given away by the livery (f).

By a warranty annexed to an estate which passes by a feoffment, the heir, as far as he claims as heir, may be barred by force of the warranty as a rebutter, though not bound by the feoffment (g).

(c) Bro. Abr. Estoppel, pl. 221.

(d) Gwill. Bac. Leases, O.

(e) 1 Inst. 265.

(f) 1 Inst. 265 b.

(g) *Edwards v. Rogers*, Sir W. Jones, 456 ; 1 Inst. 265 a.

This bar of the heir is to avoid circuity of action (h).

As to fines :

In *Edwards v. Rogers* (i), it was agreed that a fine by a stranger, or heir apparent, who \*afterwards by purchase [\*213] or by descent became owner, would bind him and his heirs.

The language of *Jones* was, that a "fine may be by way of conclusion and estoppel, although neither the conusor nor conusee had any thing in the land ; for estoppel was devised and allowed in the law in support of truth ; and to restrain a man to say a thing if it be false ; and he should be concluded to say contrary to that which he had before affirmed."

Again ; a man levies a fine of lands in which he had nothing, and afterwards he purchases the lands from him who was the owner of them ; this fine is by estoppel, and the conusee shall have the land against the conusor who purchases the land afterwards.

And this point was conceded by *Berkeley*.

And *Jones* added, that these estoppels by matter in deed [indentures of lease,] and by record, by fine or recovery, bind not only the party to the estoppel, but also all privies who claim under him ; and this appears before the statute of 4 Hen. VII. by the ancient statute of fines, that parties and privies, and their heirs, shall be concluded to avoid the fine, by saying, that *partes ad finem nihil habuerunt*, or by averment of continuance of possession, and this was by the ancient law of the land.

And *Brampston* (C. J.) agreed, that if a man levy a fine in which he has nothing, and afterwards purchase the land, or comes to it by descent, he shall be bound ; and therefore, as \*he [\*214] said, if *Andrew* [the person who levied the fine] had survived his cousin, [the person last seised] *Andrew* and his heirs had been bound by the fine, and the conclusion would have extended not only to *Andrew* and his heirs, but to all others who came in the post to the land, according to the opinion previously given by *Jones*.

In *Goodtitle v. Morse* (k), Lord *Kenyon* observed, a fine differs from the case of a surrender [of copyhold lands], for that [the fine] will be good against the heir by estoppel, although it passes no estate at all.

So in *Wright v. Wright* (l), Lord *Hardwicke* stated the law to be, that notwithstanding the expectancy of an heir at law in the life of his ancestor, is less than a possibility, it is such as he may bind himself. In law, the heir may levy a fine of lands in the life of the ancestor, which will bind by estoppel after descent to him ; so there is a method of conveying, that is, preventing a claim against it. And Lord *Coke*, in his *Reading on Fines* [21,] has these passages :

"If there be father and son, and the father levies a fine of the manor of *D*, and afterwards purchases the manor, and the conusee

(A) 1 Inst. 285 a.

(i) Sir W. Jones, 456.

(k) 3 Term Rep. 371.

(l) 1 Ves. 409.

enters ; and after the father dies, now (as it seems to me) the son shall be barred. But (as it seems to me) it is good to see the manner and form of pleading such case.

[\*215] \*" If, in the same case, the son brings any action ancestral, and as heir, and the fine be pleaded in bar, the son cannot say that the parties to the fine had nothing ; but if the son enter, and be vested, and brings assize, and the tenant pleads that the father of the plaintiff was seised in fee, and so seised, levied a fine, &c. ; the son may say, that the parties to the fine had nothing, but such a one whose estate he hath. By this way the plaint shall be tried ; and therefore the sure way for the tenant in such a case to plead, is, to show all the special matter, how his father levied the fine, and after purchased the land ; for be the fine executory or executed, the fine shall bar his heir, as it seems to me."

In short all the books agree, that a person who claims as heir to the conusor in a fine, cannot, as heir, avoid a fine by a plea of *partes nihil*, &c.

But to bind the heir, he must claim in the character, and in right of heir of the person by whom the fine was levied (m).

And, therefore, if the person who is heir claims as heir to the mother, while the fine was levied by the father ; or if he claims as a purchaser, and not as heir ; or if he claims by descent from another ancestor, though he must name the person by whom  
[\*216] the fine was levied \*by way of *pedigree*, and not of title (n) ; in all these and the like instances the fine will not be a bar to the claimant.

A mere grant as such (o), or re-lease (p), or a surrender of copyhold lands (q), will not operate by way of estoppel.

And estoppels are not binding in equity by way of estoppel.

Equity, however, will consider a lease, or alienation by a person before he was owner, as binding on him when he becomes owner (r).

But the equity was, in *Tanner v. Morse* (s), treated as *personal* against the heir, and not as binding on his estate ; so as to give a right against the succeeding heir : but the point was not decided.

Equity, however, carries its practice farther than law carries its rule.

At law, no lease, or other assurance, which operates in the first instance as and by way of conveyance (t), can be used by way of estoppel to bind any estate subsequently acquired, though the lease or conveyance does not confer the degree of interest it im-  
[\*217] ports.

In these instances the rule of law is *cessante statu*, &c. except, indeed, a tortious alienation by feoffment, fine, or recovery,

(m) Sir W. Jones, 480.

(n) *Edwards v. Rogers*, Sir W. Jones, 480.

(o) *Wivel's case*, Hob. 45.

(p) Litt. § 446 ; 1 Inst. 266.

(q) *Goodtitle v. Morse*, 5 Term Rep. 365.

(r) *Wright v. Wright*, 1 Ves. 409 ; *Beckley v. Newland*, 2 P. Wms. 191.

(s) 1 Anstr. 11.

(t) 1 Inst. 47.

be made by a tenant at will, for years, or for life, or a discontinuance be made by tenant in tail.

But in equity, if a man who has a term for ten years, make a lease for twenty years ; or a person who has an estate for life, or in tail, make a conveyance in fee, and afterwards acquires the fee ; he will, if the transaction be founded on a valuable consideration, be bound by way of further assurance to give effect and confirmation to the original lease or alienation.

Against those who may treat the learning of estoppels as contrary to justice, Lord *Kenyon's* observation may be opposed ; he observed, "where, indeed, an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate, which afterwards descends upon him, although it passes at the time, he is estopped to say that he had no interest at the time of the grant. There an estoppel is founded on law, conscience and justice (u)."

### *Under Tenants of Legal Estates.*

IN the deduction of titles, few subjects are of more importance than the difference between the legal and the equitable ownership. [218]

\*And it will be proper to enter on the consideration of titles under estates which are legal, and estates which are equitable, and under powers and authorities ; and to advert to the relative situation of trustees, and *cestui que* trusts, and of the donees of powers and of authorities, and the objects of such powers and authorities.

As one person may be the mere legal owner, while another person is the equitable owner, therefore, in analyzing the abstract, the legal title and the equitable title should be considered distinctly ; especially when the deduction to the different interests is carried on by distinct deeds, wills, &c. through a long series of years ; or when, from any other cause, the state of the title, as referrible to the legal and equitable ownership, is rendered complex.

The legal estate confers the title to the legal ownership.

Ejectments, real actions, &c. must be brought on the foundation of the title of the legal owner.

And no one can protect himself as a purchaser for a valuable consideration, and without notice, unless he obtain the shield afforded by the legal estate.

Sometimes the legal owner is by reason of his estate also the beneficial owner. In that case the title of the legal owner may be considered as complete.

\*But in many cases the legal owner is merely a trustee [219] for other persons.

Sometimes he is merely and simply a trustee ; as in the instance

(u) 3 Term. Rep. 441.

of a gift to and to the use of *A* in fee, in trust for *B* in fee; or in trust for *B* for life, remainder to *C* in fee.

In this instance the title must be considered,

1st, As it respects the legal estate :

2dly, As it respects the equitable estate.

So also after a mortgage in fee, by the owner of the legal estate, the mortgagee has the legal estate, and the mortgagor has the equitable estate ; and the title must be considered,

1st, As it regards the legal estate ; and,

2dly, As it concerns the equitable ownership.

And sometimes, as after the death of the mortgagee, it must be considered under a third head ; viz. as it respects the right to the money secured on the mortgage ; for the money will belong to the executor or personal representative of the mortgagee, although the legal estate will descend to his heir at law, or pass to some other person by a devise in the will of the mortgagee. And it is frequently of importance, and difficult, to decide whether the language of the will of a mortgagee or trustee has transferred the legal estate.

Sometimes also the trustees not only have the legal estate, but also have the control and power of disposition over the [\*220] equitable ownership, and the means of conferring a good title to the property, either absolutely, or under certain modifications or restrictions ; as with the consent of certain persons, and the like, or by the exercise of powers of sale, &c. &c.

This happens more particularly when there is an express trust, to sell and give discharges for the purchase-money ; or when, from the nature of the trusts, the money is to be placed under the control of the trustees, and to be applied by them ; indeed, in all cases, in which the purchaser is, either expressly, or by the nature of the trust, exempted from any obligation to see to the application of his purchase-money.

These observations lead to the intricate and abstruse subject of the doctrine of courts of equity, respecting the application of purchase-money.

In these courts, the *cestui que* trust, and even the person who is to receive a specific sum or annuity, is considered as substantially the owner, to the extent of his interest ; and unless the necessity for seeing the purchase-money applied be dispensed with, the purchase-money must be paid to that person, as far as he is entitled ; or must be paid or applied under his direction, or with his consent.

As the obligation of applying the money in payment to the *cestui que* trust is attended with great inconvenience, the practice has become [\*221] very general to introduce in trust deeds, wills, and settlements, a clause dispensing with all obligation on the part of mortgagees, purchasers, &c. to do more than pay the money to the trustees, or under their direction ; and titles are simplified in a very useful and important degree, by this provision ; and deeds, deducing the title under the trust deed, are

shortened; since there will not exist, except in particular cases, being those cases in which the equitable title is to be deduced under the trust, any reason for inserting the trusts in the recitals. The investigation of the title is facilitated, since the material provisions to be considered are brought into a narrower compass.

There are other cases, also, in which, by the rules of a court of equity, and from the nature of the trusts, the purchaser is exempted from all obligation to see to the payment of the purchase-money.

In the first place, when there is a trust for the payment of *debts* generally, and also of legacies, the purchaser is discharged from seeing to the payment of the debts, because, from the want of specification of the debts, it is impossible for him to know to whom the money should be paid; and as he is discharged from the obligation to see to the payment of debts, which are the primary charge, he is, as a consequence, discharged from all obligation \*to see to the payment of the legacies, which [\*222] are a secondary charge (x).

But there are exceptions to this rule :

1st, When the debts, though general, in the first place, become *specific* by proceedings in equity; or 2dly, by some other means, they are ascertained (y); or, 3dly, it is stated, that the debts are paid, so that the legacies become the only charge, &c. &c.

When the trusts require that the purchase-money should be paid to the trustees, and should be laid out, and *invested by them*, in their names, &c. ; this direction is in practice treated as equivalent to an express clause, dispensing with the necessity of seeing to the application of the purchase-money; more particularly when the trust is for infants and other persons incapable of joining in the conveyance.

But it is usual to see to the application of the money, even in cases of this nature, so far as to place the money in the joint names of the trustees, and in that fund, if any, in which the author of the trust has directed it to be applied, and to have a deed evidencing such investment, and containing a declaration of trust executed by the trustees.

\*On the application of purchase-money there are many [\*223] nice distinctions. All the useful learning on the subject will be found in Mr. *Butler's* note on Coke's Littleton. Most of the material cases are collected by Mr. *Powell* in his last edition of his *Treatise on Mortgages*. Mr. *Sugden*, in his work on Vendors and Purchasers, has arranged the cases into their proper classes, and given the points of distinction in a clear and perspicuous manner.

As a mere equitable title is not considered to be strictly marketable, and as many disadvantages arise, and a considerable risk is run, in consequence of the want of the legal title, care should be

(x) *Smith v. Guyon*, 1 Bro. C. C. 186; *Humble v. Bill*, 1 Eq. Ca. Abr. 353, pl. 4; *Jebb v. Abbot*, and *Benyon v. Collins*, Butl. n. (1) to Co. Litt. 280 b, § 12; 6 Ves. jan. 654, n.

(y) *Lloyd v. Baldwin*, 1 Ves. 173.

taken that there is a regular deduction of the legal title, and all defects in the same should be supplied.

So it is of great importance to have the legal title so circumstanced, that a purchaser may be able to rely on his possession, and to defend himself even from an ejectment from any claimant ; and, as far as circumstances will admit, there should be such evidence of the legal title, as will afford the prospect of holding the property free from eviction, under a claim of right, or any other adverse proceeding.

It is still more important that a person who purchases a reversionary interest should have such a title as would enable him to maintain an ejectment, or some other available form of action, to recover the possession, at the time when his right to the possession shall arrive.

[\*224] \*Mortgagees, or persons who advance money on the security of lands, are in a particular and special manner interested in having the legal title ; since, for want of the legal title, they are not only exposed to the risk of having their security defeated by dormant encumbrances, existing prior to their mortgages ; but a preference may be obtained as against their securities, by a subsequent encumbrancer, who shall acquire the legal title for a valuable consideration, without the notice of their prior encumbrances ; since, for want of actual possession in the mortgagees, there will not be constructive notice from possession, of the existence of the mortgages.

This subject will be more fully considered in directing the attention of the reader to the general view of the state of the title, and, in particular, of the value and importance of attendant terms for years.

All the trustees ought to join in completing the legal title, and in giving discharges for the purchase-money, if the purchase-money is to be received by them. And if a trustee once accept the trust, he cannot afterwards decline it by his own act, and under his own authority, unless there be a power or provision for that purpose (z).

But another trustee may be substituted in his place, [\*225] under a power to change trustees \*if there be any such power in the deed or will, or for want of such a power under the decree of a court of equity. But even courts of equity cannot transfer to one person authorities, such as a mere authority to sell, which were given to another person.

In cases of that nature, an act of parliament will be necessary to communicate the powers to a new trustee.

The trustees of a will who have never accepted the trust, may decline to act.

The statute of 21 Hen. VIII. c. 4, has specially provided for this case as to trustees under wills. For this purpose they should



execute a deed of disclaimer. The effect of such disclaimer will be to vest the estate in the remaining trustees, if any; and if no acting trustee remain, the will will, at law, be inoperative. Equity, however, will supply the trust; for equity never wants a trustee when the lands are charged with a trust which fastens on the land, except that the king, or the lord, by escheat, is not bound by a trust.

The trustee who means to disclaim should cautiously refrain from making a conveyance to his co-trustees. A conveyance pre-supposes an acceptance of the trust; for unless the grantor has accepted the estate given to him as trustee, he has no estate to convey (a).

\*The case of *Croze v. Dicken*, however, when analysed, [\*226] seems to have adhered to form and technicality, to the sacrifice of substance and principle.

These observations are intentionally confined to disclaimer by trustees under a will. In copyhold titles, it is frequently of great convenience, that when several persons are named as joint-tenants, and a fine on admission would be increased on account of the number of tenants, all of them except one, should, when this may be done without prejudicing the execution of the trusts, re-lease to that one, or disclaim in his favour, so as to make him *sole* tenant.

It has generally been supposed that grantees under a deed may disclaim. On that point there seems to be a distinction, which deserves attention (b).

In the first place, if a grant be made by one man to another, the estate will, in intendment of law, vest immediately in the grantee; but by refusal or disagreement the grant will be void *ab initio*. This point was fully discussed, and received a determination in the case of *Thomson v. Leach* (b b).

It has also been supposed, that when a grant is to two or more persons as joint-tenants, the disagreement of some or one of them will vest the estate in the others.

\*The books, however, and in particular that great [\*227] master of the law, *Littleton*, in his *Tenures*, treat the acceptance of the estate by one of several joint-tenants, as necessarily vesting the estate in all of them. Thus, the refusal *in pais* viz. by mere disagreement or declaration, with or without deed, by one of them, would not vest a *sole* seisin to the others. To give such sole and exclusive seisin, there must be an *estoppel*, by disclaimer on record.

Perhaps on the death of all of the joint-tenants except the one who disagreed, he would be at liberty by his disagreement or disclaimer, after he became the survivor, to prevent the estate from vesting in him solely; but the present impression is, that he could not divest the estate by any other means than a disclaimer on record.

(a) *Croze v. Dicken*, 4 Ves. 87.  
(b b) 2 Ventris, 185; 3 Mod. 236.

(b) Litt. § 685.

It is almost needless to observe, that when a grant is to several persons as tenants in common, each of them is a distinct tenant of his particular share ; and a disagreement or disclaimer by that person, even in *pos*, would have the same effect, as to his share, as if the grant had been to him as sole tenant.

The learning on this subject may be collected from the cases of *Hawkins v. Kemp* (c) ; *Crewe v. Dicken* (d) ; and *Littleton's* [\*228] *Tenures*, chap. Remitter (e) ; *Shap. Touch. chap. Deeds*, \*in that part in which he treats of agreement, as essential to the validity of a deed ; also in *Viner's Abridgment*, title Disclaimer, &c. ; and *Cruise's Digest* (f).

Whoever purchases from a trustee with notice of the trust, or without a valuable consideration, will be considered as a trustee in the place of the person from whom he receives the conveyance, as far as the trustee was incompetent to part with the beneficial ownership (g).

Hence it particularly behooves a purchaser from a trustee, to take care that the trustee has a right to confer on him a good equitable title of his own authority ; otherwise he should require the concurrence of the persons who are competent to give such title.

To protect a purchaser who buys from a trustee, he must be a purchaser for a valuable consideration, and without notice. He must obtain his conveyance, and pay his money prior to notice ; for if he have notice before the conveyance shall be executed, or after the conveyance shall be executed, and before he shall have paid all his purchase-money (and mere security is not payment), he will not be able to sustain or take advantage of the plea, that he is a purchaser for a valuable consideration, and without notice (h).

[\*229] \*It is a general rule, that a title merely equitable, is not considered as marketable ; hence the importance of taking care to have a control over the legal estate. A person who buys an estate merely equitable, always runs the risk of mortgages and other incumbrances created by the *cestui que* trust, and also of escheat, &c. ; and he obtains a title not eligible to a future purchaser or mortgagee.

On the other hand, a purchaser who buys with a view to beneficial enjoyment, will be defeated of his purpose, if the person from whom he purchase has merely a legal estate, without any right to confer a title to the beneficial ownership ; and hence the necessity of requiring the concurrence of the *cestui que* trust, in those cases in which the trustee is a mere trustee, without any power under which he can complete the equitable title.

This observation leads to the consideration already suggested, that there are two sorts of trustees ; first, such as are *mere trustees* ; and secondly, such as can confer a title in equity, as well as at law.

(c) Cro. Eliz. 80 ; 3 East, 410.

(f) Title Devises.

(h) *Mitford's Pleadings*, p. 216.

(d) 4 Ves. 97.

(g) *Bovey v. Smith*, 1 Vern. 60.

(e) § 685.

Under a conveyance to and to the use of *A* and his heirs, in trust for *B* and his heirs; *A* has the legal estate, and *B* the equitable ownership. *A* may transfer the legal estate in any manner he pleases, subject to the legal title of the trustee, till a conveyance shall have been obtained from him.

In this case *A* is a mere trustee; and he \*alone cannot, [\*230] at least in favour of a person who has notice of the trust, confer any right to the equitable estate.

The second sort of trustees are those who are intrusted with the legal estate, or a power over it; and, either generally, or with some restrictions, a trust or power to sell, to mortgage, or do some other act, is confided to them.

Trustees of this sort, pursuing the directions, if there be any, as consent, and the like, may confer a right to the beneficial ownership, as far as that right is at their disposal, by the nature of the trust reposed in them.

In general the trusts are expressed in the deed or will under which the legal title of the trustee arises. In these circumstances, no person who purchases from him, can protect himself by alleging that he is a purchaser for a valuable consideration without notice.

The declaration of trust in the deed by which the trustee derives his title, is implied notice of the trust; since the trustee cannot give evidence of his right to the legal estate without disclosing the trust to which that estate is subject. And if one deed be, by any means, connected with another; as a lease made in consideration of the surrender of a former lease; this lease will be implied notice of the title or tenant-right under that lease (i).

But when the legal estate is conveyed by \*one deed, [\*231] and the trust is declared by a distinct deed; or if by any other means, the evidence of the legal title be altogether independent of the trust, then a person who purchases of a trustee, without actual or constructive notice of the trust, will be entitled to hold discharged from the trust.

A sale to a purchaser for a valuable consideration without notice, will discharge the lands from the trust; so that the lands will not be liable to the trust in the hands of a subsequent purchaser; although such subsequent purchaser may have notice of the trust, since, were the rule different, the innocent owner could not have the full benefit of his property.

But a re-purchase by the trustee himself would revive the trust (k) as against him and his heirs; though the lands were discharged while they belonged to the former purchaser.

Among various other purposes for which trustees are constituted, they are sometimes appointed for supporting contingent remainders; and if they concur in destroying the contingent remainders,

(i) *Coppin v. Fernyhough*, 2 Bro. C. C. 231.

(k) *Boocy v. Smith*, 1 Vern. 60.

instead of performing the duty of preserving them, they will be guilty of a breach of trust ; and whoever purchases with notice of the uses, which these trustees were bound to protect, will become a trustee for the objects of these uses.

[\*232] There are some, though a very few, cases \*however (l), in which trustees will be decreed to join in a new settlement, though they will, by that means, destroy some of the uses they were appointed to preserve ; and there are some cases in which it is the better opinion, that they may, in their discretion, assist the first tenant in tail in suffering a common recovery, and barring the remote estates, even without the direction of a court of equity.

In the late case of *Moody v. Waller* (m), all the authorities were reviewed by the present chancellor (Lord Eldon), but no practical conclusion can be drawn from the judgment.

The particular case was decided on the ground that there were *special circumstances* which sustained the title ; although the recovery could not have been suffered without the concurrence of the trustees for supporting contingent remainders.

But in a subsequent case his lordship has, it is apprehended, gone the whole length, as a general proposition, that it is no breach of duty in a trustee for supporting contingent remainders, to join with tenant in tail in suffering a common recovery.

Whenever the freehold is by a settlement placed in trustees, it will be proper to give them, by a special provision, an authority or discretion to join in assisting the tenant in tail in suffering a common recovery.

[\*233] \*At one period, it was understood that a trustee could not purchase the estate of which he was a trustee. The rule is to be understood with the qualification, that it is at the option of the *cestui que* trust, either to insist on the sale, or to have the lands re-sold (n), or to have the benefit of any sale which has been made by the trustee. On this subject, the 14th chap. of Mr. *Sugden's Law of Vendor and Purchaser* will afford the requisite information.

### *Of the Cestui que Trust.*

THE *cestui que* trust is the equitable or beneficial owner. That ownership may be settled and modified, and estates-tail therein may be barred, in the same manner, and under the same circumstances, as if the owner of the equitable estate were the owner of the legal estate. This important difference is, however, to be kept in view ; the owner of an equitable estate may convey by an instrument which would not be effectual at law for a legal estate.

For instance, there is no case in which a feoffment, or lease and re-lease, is necessary to convey his estate ; and a bargain and sale

(l) See 1 Fearn, p. 331.

(m) 16 Ves. 238.

(n) 8 Ves. 337.

will be good, though it be not enrolled; and before the statute of 4 and 5 Anne, a grant of an equitable estate would have been good without attornment. For all these ceremonies of livery, attornment, &c. &c. are peculiar to legal estates, \*and [\*234] are founded on rules of tenure, in no degree referrible to equitable estates.

And if a trustee convey under the direction of the *cestui que trust*, although there be not any words of grant, on the part of the *cestui que trust*, yet the equitable, as well as the legal, ownership will pass. Such was the opinion of gentlemen of distinguished eminence; and the equitable owner may convey his ownership without the concurrence of his trustee.

In regard to recoveries by equitable owners, all that is material will be found in the chap. on Common Recoveries, in the 1st Vol. of the *Practice of Conveyancing*.

Lord Alvanley observed, "equitable estates are to be held perfectly distinct and separate from the legal estate. They are to be enjoyed in the same condition; entitled to all the same benefits of ownership; disposable, devisable, and barrable, exactly as if they were estates executed in the party; and the persons having them may, without the intervention of the trustees, or the possibility of their preventing them from exercising their ownership, act as if no trustees existed, and this court will give validity to their acts. And when I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction, that it is the same estate in equity and at law (o)."

\*There is one qualification to this rule. A married woman having a separate estate is considered as a *feme sole*, so far, as by the nature of the trust, she is constituted a *feme sole* (p).

And another rule may be added; whenever the equitable estate and the legal estate, for the like corresponding interests, vest in the same person, the equitable interest will merge in the legal estate; and the heir to the purchaser of the legal estate, and not the heir to the purchaser of the equitable estate, will be entitled (q).

For as between heirs or representatives, there is not any equity. Each class must take the property as it is found, unless there be a contract to the contrary; for under contracts real estate may be considered as personalty; and personalty may be treated as realty, as between representatives.

With this exception, another general rule is, a man cannot be a trustee for himself, nor in general for his representatives.

In investigating titles to the legal, as distinguished from the equitable, ownership, conveyances are to be divided into two classes.

(o) *Phillips v. Brydges*, 3 Ves. 127.

(p) *Burnaby v. Griffin*, 3 Ves. jun. 266.

(q) *Goodright v. Wells*, Dougl. 771, 2d edition; *Selby v. Alston*, 3 Ves. jun. 330.

1st, Conveyances which operate by passing a common law seisin, to supply the use ; and

2dly, Conveyances which owe their effect entirely to the [\*236] statute of uses, and under which \*the use arises, from the seisin of the owner himself.

Of the former description are,

Feoffments ;

Fines ;

Recoveries ;

Gifts ;

Grants ;

Releases, and confirmations in enlargement of a previous estate ; and consequently, the ordinary conveyances by lease and re-lease ;

Also wills.

Of the latter description are,

1st, Bargains and sales of use under the statute of uses, and of enrolment.

2dly, Covenants to stand seised to uses.

When a conveyance is to a man and his heirs, the legal seisin passes to him ; and if the use be declared in his favour, or if from the nature of the transaction, as by payment of a consideration, or for any other cause (*r*), the estate is to remain in him, he will continue seised by the rules of the common law. So if the use be declared in favour of him and his heirs, the seisin will remain in him by the rules of the common law ; and this use, declared in his favour, will exclude the right of the grantor to have the lands by resulting use ; or to pass the legal estate through the medium of the statute to any other person, by declaring any further use of the seisin of *A*.

[\*237] \*But the use may be declared partly in favour of *A*, and partly in favour of some other person ; as to the use of *A* for his life, remainder to the use of *B* in fee, or to the use of *B* for life, remainder to the use of *A* in fee ; or the use may be varied in any other manner ; or the use may be declared in part, so as to leave the fee as a reversion in the grantee, under the rules of the common law. And powers may be introduced into such conveyances ; or the use may be declared wholly in favour of strangers ; so that *A* may be merely a feoffee, or re-lessee, or devisee to uses. In all these instances the use will be executed by the statute.

In short, whenever a common-law seisin is conveyed to one person, either for life, in tail (*s*), or in fee, to the use, or, which is the same in effect, in trust for another person, the use will be executed by the statute, unless it be open to the objection of being an use on an use ; or, in other words, and more correctly, unless it be repugnant to some use previously declared.

(*r*) *Altham v. Anglessea*, Gilb. Eq. Cas. 16. (*s*) *Thurman v. Cooper*, Cro. Jac. 476.

Sometimes, for want of an express declaration, the use will result to the former owner.

That an use may result, there must be a *vacancy* of ownership under the declaration of uses, commensurate with the period, or corresponding with the estate which is to result; for instance, if a conveyance be made by *A*, \*to *B* in fee, to [\*238] the use of the heirs of the body of *A*, the use may result to *A* for his life, unless the freehold be limited to some other person for his life; or unless there be an express estate for years, which excludes the presumption, since an express estate will never be defeated by implication.

So if several uses, by way of particular estate, be declared of the seisin, but no use is declared of the ultimate fee, the fee will result to the former owner, unless there be an apparent intention to keep the fee in the grantee; and whatever use results to the grantor will be executed by the statute.

So if a feoffment be made, fine levied, or recovery suffered, and no use declared of the assurance, and there is not any circumstance; as a consideration, a special trust, or the like, to keep the estate in the demandant in the recovery, the conusee in the fine, or the feoffee, &c. the use will result to the former owner, according to his former ownership.

And if several persons join in such recovery, &c. the use will result to them, according to their respective shares, estates, and interests. For instance, if joint-tenants are the conveying parties, the use will result to them as joint-tenants. If tenants in common are the grantors, the use will result to them as tenants in common, and for the like shares as they formerly had; and each will, in point of title, have his identical share; and if *A*, tenant for \*life, and *B*, the remainder-man in fee, convey, the use [\*239] will result to *A* for life, remainder to *B* in fee.

But if tenant in tail be the conveying party, then the use resulting to him, will be an use of the fee; either absolute or determinable, according to circumstances, and not an estate-tail (*t*).

He will have a fee commensurate to that estate, which passes by his conveyance to the demandant in the recovery, conusee in the fine, feoffee, &c. However, when no express use is declared, the conusee in a fine, a feoffee, &c. may show that he is entitled to retain the estate for his own benefit.

In the technical language of the books, he may rebut the implication of an use, and aver that the recovery was suffered, the fine was levied, or the feoffment made to his own use (*u*).

This is a reason for uniformly declaring the uses of fines, &c. to prevent any doubt respecting the state of the title to the legal estate under the uses.

(1) *Moxon v. Moxon*, and *Hodges v. Fowler*, in the Exchequer, 1777, 1st Vol. of *Preston's Practices of Conveyancing*, 195.

(u) *Altham v. Anglessa*, Gibb. Equity Cases, 16; *Roe v. Popham*, Dougl. 24; and *Thurstout v. Peak*, 1 Str. 14.

There are also many cases in which the legal estate may remain in the demandant in a recovery, a conusee in a fine, a feoffee, the trustee or devisee of a will, &c. &c. Thus, if a tenant [\*240] \*in tail levy a fine to *B*, without declaring any use of the fine, and, at the distance of several years, a common recovery be suffered, in which *B* shall be named tenant to the writ of entry, this circumstance will lead to the conclusion that the fine was levied to *B* for the purpose that he should be tenant to the writ of entry ; and, as a consequence, since he could not be tenant without retaining the seisin, the seisin will remain in him (x).

So if a consideration be paid by the conusee of a fine, a feoffee or re-leasee, &c. ; and no use be declared in favour of any other person, the use will remain in him, notwithstanding no use shall be expressly declared in his favour. But the use will not remain with him in opposition to an express use, declared in favour of some other person, if such use be declared in the deed of feoffment, grant, &c. to him, or be declared with his concurrence. And even a nominal consideration will not keep the use in the re-leasee, when an use is declared for life in favour of some other person, and no intention to give any beneficial interest to the grantee is apparent (y).

So if a conveyance be made to *A*, to the intent that he shall be tenant to the writ of entry, this declared intent will prevent the resulting of the use, and keep the seisin in him.

[\*241] \*So if a conveyance or a devise be made to *A* and his heirs, upon trust, to sell, to convey, to pay the rents, &c. ; these and the like declarations of intent render it necessary that the legal estate should remain in the trustees ; and, as a consequence, rebut the presumption of a resulting use ; and in many cases they have the effect of showing, that even uses expressly declared are not to confer any other title than to the equitable ownership.

So if a conveyance or devise be to trustees upon trust, for the separate use of a married woman, the legal estate will remain in the trustees, for the purpose of enabling them to protect the interest of this woman (z).

In some cases, as in *Jones v. Lord Say and Sele* (a), (which, however, is a case *sui generis*, and an anomaly,) the estate may remain in the trustees only for a particular period, as for life, and a subsequent use may be executed by the statute. This case depends on the peculiar language of the will ; and the circumstance that the gift to the heirs of the body was introduced by a break in the sentence, and by an independent clause, containing evidence of an intention that after the death, &c. the trustees should stand seised to uses.

[\*242] In a recent case (b), the court of King's \*Bench favoured the construction, under which the trustees took a particular estate, with a chattel interest superadded, as the means

(x) *Altham v. Anglessea*, Equity Cases, 16. (y) *Shortbridge v. Lamplugh*, 2 Salk. 678.  
(z) *Silvester v. Wilson*, 2 Term Rep. 444. (a) 8 Vin. Ab. 202; 10 Mod. 43.  
(b) *Doe v. Simpson*, 5 East, 162.



of giving effect to the presumed intention of the testator, without keeping the legal fee from the other objects of his will. This is the first decision in which such a latitude of arrangement has been exercised.

Generally speaking, a limitation to the trustees, and their heirs, will give the fee to them. Thus, a devise to *A* for life, with remainder to trustees, and their heirs, without saying for the life of *A*, and after his death to his first and other sons in tail, will place the legal fee in the trustees; and the subsequent limitations will confer mere equitable estates; but if from the context of the will or deed there would be any repugnancy in considering the legal fee to be in the trustees, then, on the context of the instrument, the estate of the trustees would be confined to the period of the life of that person from whose death the limitation over is to have effect. Thus, if in the instance last adduced there had been subsequent limitations to *C* for life, with remainder to the same trustees, and their heirs, without saying for the life of *C*, or to the same trustees for years, with remainder over after the death of *C*; or, if among the subsequent limitations a term for years had been given to the trustees, this circumstance would have afforded an implication that the trustees should take merely an estate for life under the first clause. \*This construction arises from the consideration [\*243] that the ulterior limitation to the trustees would, in a legal point of view, be nugatory, unless from the context, and with a determination to give effect to every part of the deed, the court should confine the first limitations in favour of the trustees to a period of a life. The material cases on this point are *Shapland v. Smith* (c); *Venables v. Morris* (d); *Compere v. Hicks* (e); and *Curtis v. Price* (f).

It is also to be observed, that no estate arising from a declaration of use can be more extensive than the estate, or seisin, from which this use was supplied (g). For this reason, if *A*, being tenant for his life, convey to *B* and his heirs by lease and re-lease to the use of *C* and his heirs, *C* would take a seisin merely for the life of *A*; and the estate of *C* would be commensurate with that period. But in some cases the declaration of use may be construed to be part of the limitation, and convey a larger estate than would otherwise have passed. In this point of view it must be considered as part of the limitation of the legal estate, and conferring a right by the rules of the common law, independent of the statute of uses; and not as an use divided from the legal estate.

\*For example: *A*, seised in fee, conveys to *B*, to hold [\*244] to *B*, to the use of *B* and his heirs, for the lives of *A*, *B* and *C*. This declaration of use will be considered as part of the limitation of the legal estate, and will convey the lands during the several lives of *A*, *B* and *C*; while, if the conveyance had stopped

(c) 1 Bro. Ch. Cas. p. 74.

(d) 7 Term Rep. 342.

(e) 7 Term Rep. 433.

(f) 12 Ves. 89.

(g) *Jenkins v. Young*, Cro. Car.; and *Preston's Essay on Estates*, introductory chap

at the *habendum* to *B*, *B* would have been merely tenant for his own life.

This rule of exposition is applicable only when the grant and declaration of use are in favour of the same person. For when the grant is to one person, and the use is in favour of another person, the use must necessarily arise from the seisin, and cannot confer a larger interest than the seisin or estate out of which the use is to be supplied.

But a conveyance to *A*, and his heirs, in trust for *B* and his heirs, *totidem verbis*, or to that effect, or in trust for *A* for life, or to permit him to receive the rents and profits, gives an use which will be executed by the statute. For these trusts are, in effect, uses, and the statute of uses takes notice of trusts as well as uses, and embraces, and converts into estate, all trusts which are in substance and effect uses.

But there are some trusts which are not uses ; of this description are trusts to sell for the benefit of *B* ; or of creditors ; or to receive the rents, and pay them to *B*, and the like. For in these [\*245] instances the use is in the trustees, subject \*only to a trust directing the application of the rents.

In drawing the conclusion, that an use is executed by the statute, several circumstances are to be regarded :

1st, That the legal seisin is transferred to the feoffee, or other grantee :

2dly, That he is capable of being seised to an use :

3dly, That there is an estate of freehold or inheritance to supply a seisin to uses :

4thly, That there is a subject of which an use may be declared :

5thly, That there is a person to take, and capable of taking, the use :

6thly, That an use is declared, and that it is warranted by the rules of law.

On all these points, *Chudleigh's case* ; *Shelley's case* ; *Mr. Butler's note*, in *Coke's Littleton*, on Uses and Trusts, and his *Practical Notes* ; *Cruise on Uses* ; *Bacon on Uses* ; *Saunders on Uses* ; *Preston's Shep. Touch.* chap. Uses, and *Comyns's Digest*, title Uses, together with the observation in the introductory chap. of *Preston's Essay on Estates*, should be consulted.

No subject more materially concerns the conveyancer, or the state of titles, than the doctrine of uses ; and a large portion of time should be devoted to attain the knowledge of this part of the law. The subject should be rendered perfectly familiar ; for without a thorough knowledge of the law on this subject [\*246] \*no one can peruse an abstract of title with satisfaction, or advise on it with credit to himself or justice to his client.

Under a former division (*h*), various instances in which an act may be done under the doctrine of uses, or through the medium of

a conveyance to uses, which could not be accomplished by the rules of the common law, have been stated.

In investigating titles to the equitable, as well as the legal, ownership, it often becomes a subject for minute and anxious consideration to decide whether a person has the legal, or only an equitable, estate, under the language of a particular deed or other instrument; and this question most commonly arises on wills.

A few observations on this point may be useful :

1st, No one, except by committing a disseisin, can transfer the legal estate, unless it be vested in him, or unless he have a power or authority over the estate; and he cannot have such power unless it be under a conveyance or devise to uses; nor such authority, unless it be given to him by will, or act of parliament.

*Authorities* were known to the common law; but powers, as distinguished from authorities, owe their introduction to the doctrine of uses. In short, these powers are a modification of the use.

\*Some powers are coupled with an interest; some are [\*247] mere naked authorities. But even when they are naked authorities they are more properly denominated powers than authorities.

To begin with authorities.

#### *On Titles under Authorities.*

AN authority to *A* to sell, given by will, will enable *A* to confer a title to the legal estate, and as the exercise of this authority passes a common-law seisin, an use may be declared of such seisin. Such use will be executed by the statute for transferring uses into possession (i).

Thus, if *A*, having an authority to sell or mortgage, bargain and sell to *B* and his heirs, to the use of *C* and his heirs, *B* will have the legal seisin by the rules of the common law, and this seisin will be drawn out of him by the operation of the statute of uses, and vested in *C* and his heirs. For this use in favour of *C* is not open to the objection of being an use on an use, or an use in the second degree. It is an use declared of a common-law seisin.

The like observation is applicable to bargains and sales by commissioners of bankrupt, and under the land-tax acts, and other acts conferring authorities, &c. &c. But if such a bargain and sale be made to and to the use of *B* and his heirs, by one [\*248] entire clause, or to *B* and his heirs, to the use of *B* and his heirs, by several clauses, with a further limitation to the use of *C* and his heirs, then the use declared in favour of *C* will be a mere trust or equitable estate, since the use declared in favour of *B* renders any further declaration of use repugnant. An alternate or shifting use is not exposed to this objection.

(i) 27 H. VIII. c. 10.

*Of Powers.*

By the exercise of a power an use passes, and this use will be executed by the statute ; and therefore if *A*, having a power to appoint to uses, appoints to *B* and his heirs, to the use of *C* and his heirs, *B* is the *cestui que* use ; and this use will be executed into estate by the statute, and, as a consequence, the use declared in favour of *C* will confer a title merely equitable.

But appointments admit of shifting uses, and such shifting uses may become estates under the statute. Thus an appointment may be by *A*, to the use of *B*, and his heirs ; and if *B* shall die under the age of twenty-one years then to *C* and his heirs.

In the former case the secondary use is merely equitable, not executed by the statute ; because it is to arise from the seisin of *B*, and *B* is merely a *cestui que* use, so that the use to *C* is an use on an use.

But, in the latter case, the use in favour of *C* is limited [\*249] by way of substitution for the use \*to *B*, and is to arise from the seisin of the person to whom the original conveyance was made, and under which the power exists ; consequently it is free from the objection of being an use on an use, or an use in the second degree, to arise on the estate of the former *cestui que* use.

This comprehensive head of the law should be pursued in Mr. Sugden's Treatise on Powers.

*Of Persons having Authority.*

As authorities are mere powers, without any interest, they are construed strictly, while powers conferring an interest receive a liberal construction.

Powers are admissible only in wills and assurances which owe their effect to the statute of uses. Trusts by way of power are common to such assurances, and to conveyances in trust, and to acts of parliament. As authorities must be observed strictly, they must be executed according to the language, or at least the true construction, of the terms of the authority. Naked authorities cannot, without a special power for the purpose, be re-leased or extinguished by the person to whom they are given. They may, however, be re-leased by the person in whose favour they are to be exercised : for example ; if *A* have an authority to make an appointment in favour of *B*, a re-lease may be made by *B* of the right to take under the power. The re-lease should be to the owner [\*250] of the land, \*and not to *A*. When an authority is given to two or more, jointly, all must concur in the exercise of the authority, except the case fall within the provisions of the stat. of Hen. VIII. or the power is expressly delegated to the survivors and survivor, &c.

By the statute of 21 Hen. VIII. c. 4, after reciting, that "divers sundry persons, before this time, having other persons seised to their use of and in lands and other hereditaments to and for the declaration of their wills, have by their last wills and testaments willed and declared such their said lands, tenements, or other hereditaments, to be sold by *their executors*, as well to and for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for other charitable deeds to be done and executed by their executors, for the health of their souls; and notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands, tenements, and other hereditaments have been declared, and in the same divers executors named and made, that after the decease of such testators, *some* of the executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to \*fulfil [\*251] and perform all things contained in the same, and the residue of the same executors, uncharitably, contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator. And forasmuch as a bargain and sale of such lands, tenements, or other hereditaments so willed by any person to be sold by his executors, after his decease, after the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same, by reason whereof, as well the debts of such testators have rested unpaid and unsatisfied, to the great danger and peril of the souls of such testators, and to the great hindrance, and many times to the utter undoing of their creditors, as also the legacies and bequests made by the testator to his wife, children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator, and also to the neglect of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God: For remedy thereof, it is enacted, that where part of the executors named in any such testament of any such person so making or declaring any such \*will, of any lands, tene- [\*252] ments, or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will, wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will, then all bargains and sales of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, as well heretofore

made as hereafter to be made by him or them only of the said executors that so doth accept, or that heretofore hath accepted and taken upon him or them any such care or charge of administration of any such will or testament, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements or hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare, any such will of any such lands, tenements or hereditaments, after his decease to be sold by his executors."

With a proviso, that this act should "not extend to give power or authority to an executor or executors, at any time thereafter, to bargain, or put to sale any lands, tenements or [\*253] hereditaments by virtue and authority of any will or testament theretofore made, otherwise than they might do by the course of the common law afore the making of this act."

And this statute has been construed to extend as well to lands which are actually devised to two or more executors as to lands over which there is merely an authority (k). Some gentlemen confine this act to executors being trustees of the will; while other gentlemen consider all trustees of a will for the sale of real estate as executors within the scope of this act.

But it is right to have a disclaimer from the trustee who refuses to act, as affording direct and certain evidence of his refusal. A deed of disclaimer is preferable to a re-lease or conveyance; for a conveyance, and perhaps even a re-lease, unless very specially penned, is evidence of a previous acceptance of the trust (l).

When an authority is given in terms to several, and the survivors and survivor, and to the heirs, or to the executors, &c. of the survivor, it may be exercised by any of the persons when they answer the descriptive terms of the power.

But if an authority be given to three persons *nominatim*, as to A B, and C D, &c. it must be exercised by all of them, [\*254] except in the \*case of a will, and the refusal of one or more of the trustees to act. So that after the death of one of those persons the authority will be at an end. But under trusts annexed to an estate the surviving trustee may sell.

So when an authority is given to executors, *eo nomine*, it seems the better opinion, that the executors for the time being, and even the executors of the surviving executor, may exercise this authority (m); and unless the contrary be declared, these authorities are merely *personal*; and in consequence of the rule *delegatus non potest delegare*, these authorities cannot be exercised by means of a deed executed by attorney (n).

(k) 1 Inst. 113 a; *Bonifant v. Greenfield*, Cro. Eliz. 80.

(l) *Crewe v. Dicken*, 4 Ves. 97.

(m) *Coke Litt.* 113 a, and note (2).

(n) *Combe's Ca.* 9 Rep.; *Hawkins v. Kemp*, 3 East, 410.

Such authorities occur, for the most part, in wills, by which power is given to executors to sell, or to mortgage; and, in particular, to sell copyhold lands for the purpose of giving a title to the bargainee, immediately under the testator himself, without any necessity for the admission of his executors.

Authorities also arise from acts of parliament, as under the bankrupt laws, and for the redemption of the land-tax, and under conveyances to uses, as powers to appoint in favour of children, powers to trustees to sell and exchange, to make partition, and the like powers.

For though these authorities are generally \*called [\*255] powers, and they are powers in their mode, yet they are more properly considered as authorities.

The person to whom they are delegated is merely a trustee, and hence *naked* authorities; as authorities to appoint in favour of children are construed strictly.

Naked authorities should be exercised purely and gratuitously for the benefit of the object of the power, and not for the benefit of the person by whom the power is to be exercised.

Any fraud in the exercise of the power will vitiate the appointment, at least in equity; and in many cases the appointment may be void, even at law (o), for fraud in the exercise of the power.

Also, if the power be to appoint in favour of children, or all the children, an appointment so made as to exclude some or one of the children will be void.

But such a power authorizes appointments at different times, and an appointment may be good if it appoint part of the subject, and leave a share not merely illusory unappointed. Such appointments as are originally good will not be affected by any subsequent contravention of the power. That appointment alone which is inconsistent with and first contravenes the power, will be void (p).

\*Powers, however, may be so expressed as to give a right [\*256] of *selection*; and under such powers an appointment, made *bonâ fide*, may be to some or one of the children, or other objects, in exclusion of the other or others of them.

Of this description are those powers which enable the party to appoint to any one or more of the children, &c. &c. or are in favour of *such* children, &c. as the donee of the power shall appoint.

Authorities in wills differ from authorities in conveyances to uses in one material circumstance.

Under authorities of the former description, a common-law seisin, and under authorities of the latter description, an use to be executed by the statute, will be given.

Hence the distinction, that in the former case uses may be de-

clared of the seisin of the appointee or bargainee, and be executed by the statute of uses, and in the latter case an use declared of the estate of the appointee will be an use on an use, and for that reason a mere trust or equitable interest, not executed by the statute.

In considering the actual state of titles, this distinction should be constantly kept in mind ; and as often as in the exercise of a power to appoint to uses, an appointment is made to *A* and his heirs, to the use of *B* and his heirs, the legal estate must [\*257] be considered as vested in *A*, subject to a trust or equitable interest in favour of *B*.

These observations, however, suppose the legal estate to have been conveyed to supply a seisin to the uses, and that the power is a power, by way of use, over the legal estate.

For if the person by whom the settlement was made has only an equitable interest, all the uses and trusts declared by that settlement, whatever may be its language, will be merely the modifications of the equitable ownership ; and then equity regards the substance, and not the form, of the conveyance ; and the estate will, in equity, be in the person for whom the beneficial ownership is intended ; and the person in whose favour the use, in the second degree, is declared, will be considered as the beneficial owner.

Persons who have merely authorities do not, in strictness, convey. They sell or appoint. The title is derived immediately from the authority, and from the person by whom that authority was delegated ; so that under an authority to sell in a will, the vendee derives his title merely by the rules of the common law, and consequently an use may be declared of his seisin.

And till the authority is exercised, the seisin remains undisturbed. Thus, in the case of an authority to sell, given by a will, the seisin remains in the person, if any, to whom the same is devised ; [\*258] and if no devise is made of the seisin, \*then in the heir at law, till the authority be exercised (*q*).

So under authorities given by the statute law, the seisin remains, of necessity, and to avoid abeyance, in the bankrupt or other former owner, till the authority shall be exercised. But when the authority is exercised, it will overreach and defeat all estates, charges, and encumbrances, affecting the seisin, and being subsequent to the creation of the authority.

Thus, if *A* have an authority to appoint among his children, the right of taking under the exercise of this authority is an interest in the children, and may be released by them. The release should be to the person whose ownership will be affected by the exercise of the authority ; and not to *A*, as the donee of the power.

This conclusion flows from the principle *unum quodque dissolvi potest, &c.*

As no interest resides in the person to whom the authority is



given, neither the doctrine of nonclaim, nor of estoppel, will preclude the exercise of the authority.

A feoffment, or a fine, with a deed of uses, or any other instrument purporting to be a deed of sale, may amount to a sale in exercise of the authority; but a feoffment, or fine, will not extinguish the authority, or bar the right of exercising the authority.

Although it be the \*acknowledged operation of a fine to [\*259] bind all rights, present or future, which are in the person by whom the fine is levied; yet the case of a naked authority is not within the scope of the general rule; since the authority is an interest in the persons who are to be benefited by the exercise of the authority; and not in the persons to whom the authority is given: and authorities to sell, &c. are not barred by the operation of nonclaim on fines (r), because, till the exercise of the authority, there is not any person who can maintain a *claim* by virtue of the authority: but from the moment the authority shall be exercised, the person who shall be entitled to an estate by means of the authority, must assert the title within the period limited by the statute of nonclaim on fines, or he will be barred by his nonclaim.

As a deed exercising an authority at the common law, is properly considered as a sale, or as a bargain and sale, a deed of bargain and sale is the more usual form of exercising an authority of this description, and even copyhold lands are bargained and sold by deed, and such bargain and sale is presented at the lord's court, and the bargainee admitted: but an instrument, in any other form, as well as an instrument in the form of a bargain and sale, will produce the same effect: for example; a lease and re-lease, in exercise of an authority \*over freehold land, will operate in [\*260] the mode of a sale, or bargain and sale.

These bargains and sales owe their effect to the rules of the common law. They are not within the statute of enrolments. That statute is applicable only to bargains and sales which have their effect under the statute, for transferring uses into possession. Hence it follows, that bargains and sales under authorities do not require enrolment, except so far as enrolment is prescribed by the deed, will, or act of parliament, by which the authority was created.

Bargains and sales under the land-tax acts, and under the statutes against bankrupts, require enrolment by the express provisions of these statutes; and entails in bankrupts cannot be barred unless the bargain and sale be enrolled within six months.

It is also to be remembered, that sales under authorities, in a conveyance to uses, receive the denomination and have the effect of *appointments*, and not of bargains and sales. Thus, if a man by his will give to another power to sell, and a sale is made to B, B must be considered as a bargainee or vendee, and must plead the will, and the instrument of sale as his title; but when a conveyance

(r) 1 Inst. 237 a; 1 Rep. 174; *Willis v. Shorrell*, 1 Atk. 474.

is made to uses, with a power to sell, and a sale is made by virtue and in exercise of the power, the vendee must be considered as the appointee of \*the use, and he must plead his seisin as derived under the conveyance to uses, and the deed of sale, and the statute for transferring uses into possession.

These observations have been extended to a considerable length, from a conviction of the importance of forming accurate opinions on points which affect the legal title.

It will be proper to take a collective view of the law, as it is applicable to the objects of a power.

The objects of a power are the persons who are to take under the exercise of the power. Where the power is to appoint among particular persons, or some of them, as in the instance of powers in favour of *A B*, and *C D*, or in favour of a class of persons, as children, or of any or either of them ; the power of making the appointment is a mere authority ; but the right of taking under the appointment is an interest, a benefit.

These consequences follow :

The person to whom the power is given may exercise the power, but he cannot re-lease it, nor, according to the more prevailing opinion, (an opinion combated by Mr. *Sugden*, who is supported by some gentlemen of great learning,) will it be extinguished by his fine, &c.

But the person in whose favour the power is to be exercised may release the right of taking under the power. This may [\*262] be accomplished \*by making a feoffment (*s*), by levying a fine, or by a re-lease.

But some powers are an interest in the person to whom they are given ; as powers to revoke and appoint new uses for a man's own benefit ; powers to jointure (*t*), to lease, to charge, or to raise money for his own benefit ; and all such powers may be re-leased or defeazanced, and consequently varied or modified (*u*).

No title requires more care than one which depends on a power. All the circumstances of the power must be pursued, except in a few particular cases in which equity supplies a defect in the execution of the power ; as in favour of a wife, children, or creditors, or purchasers for a valuable consideration.

Most powers have circumstances, prescribing the persons by whom, the time at which, and the mode in which they are to be exercised, the estate to be appointed, and the ceremonies which are to attend the exercise of the power ; and it is prudent to analyze the power, to divide it into parts, and to collect the different circumstances required to its valid exercise ; and then to refer to the deed or will exercising the power, and see that all these circumstances have been observed.

1st, As to the persons.

(s) *King v. Melling*, 1 Vent. 214.

(t) *Ibid.*

(u) *Digge's case*, 1 Co. 173 ; and *King v. Melling*, 1 Vent. 214.

\*In titles under authorities, particular care must be taken [\*263] that the authority was exerciseable by those persons under whose appointment the title is derived.

An authority to *A*, *B*, and *C*, cannot be exercised by two of them, except the case fall within the statute of 21 Hen. VIII.; nor then unless there be a disagreement or disclaimer by the other trustee.

An authority to be exercised, with the consent of *A*, cannot be exercised *without* such consent; nor after it is become impossible by the death of *A* that such consent should be given (*x*).

An authority to the survivor of *several* persons cannot be exercised until the survivor shall be ascertained; and therefore an attempt by both the persons to exercise the power will be nugatory, since the survivor is not ascertained (*y*).

But an authority to executors, *eo nomine*, or to sons in law, *eo nomine*, may be exercised by the *class*, after the death of some of them, and while the words of the power can be satisfied (*z*). This subject affords a large head of investigation, with many and nice distinctions.

When no person is named by whom an authority contained in a will shall be exercised, \*then there is a difficulty in ascertaining from whom the legal estate shall be taken. [\*264]

When the sale is to be for purposes connected with the office of executors, then the authority is, by construction of law, to be exercised by the executors (*a*).

This point is universally conceded. In other cases, it is doubtful whether the executors shall sell as having an authority; or the heir shall sell and convey as bound by a trust (*b*).

According to a case in 2 Leon. 22, the executors shall sell; while according to *Pitt v. Pelham* (*c*), the heir is a trustee to sell.

The authorities are collected in *Powell on Devises* (*d*).

Although executors renounce the probate of the will as to personal estate, they are not, by such renunciation, disqualified to execute an authority of sale, &c. over real estate (*e*).

So a power given to a person, to be exercised while under coverture, or while sole, cannot be exercised by the person to whom it is given when that person is differently circumstanced.

So a power given to a person, to be exercised *when in possession*, or when in receipt of the rents, &c. cannot be exercised till he is in possession, or in receipt of the rents.

\*In equity, however, a person may contract to exercise [\*265] a power before the power is in *esse*; and the moment the power shall vest, or be exerciseable, the contract will in equity be

(*x*) *Dyer*, 219; *Mansell v. Mansell*, Wilmot's Rep. 36.

(*y*) *Doe v. Tomkinson*, Maule & Selwyn, 165.

(*z*) *Townsend v. Wale*, Cro. Eliz. 524; Jenk. Cent. 44.

(*a*) 1 Anderson, 145; Keilw. 45.

(*b*) *Pitt v. Pelham*, 1 Lev. 504; *Yates v. Compton*, 2 P. W. 308; *Blatch v. Welsh*, 1 Atk. 420.

(*c*) 1 Lev. 504; 1 Ch. Cas. 176; *Yates v. Compton*, 2 P. W. 308.

(*d*) Page 292. (e) 2 P. W. 309; Keilw. 44 b.

deemed a valid exercise of the power (*f*); and a power well exercised in equity will be binding on the party and his heirs, the issue in tail, and also on all persons in reversion or remainder (*g*). The like observation applies to contracts by persons having a power of leasing (*h*).

To most powers of this kind there is added as a qualification, when he shall be in possession or in receipt of the rents by virtue of the limitations hereinbefore contained.

And a question arises, whether the right to exercise this power can be accelerated by the surrender or other determination of the prior estate. It is clear, that a mere assignment of a prior life-estate will not qualify the assignee, as having such estate, to exercise the power; for he is not seised by virtue of the limitations in the deed creating the power in the sense in which the phrase was used.

2dly, When a power is to be exercised at a given time, as after the death of *A*, it cannot be exercised at law during the life-time of *A*.

[\*266] But an exercise of the power, by a contract \*in equity, in the life-time of *A*, will be binding only from the death of *A*; and in the event only, that the donee of the power shall be living at the death of *A*.

In like manner, a power given to be exercised on any other event, cannot be exercised with effect till that event is arrived.

3dly, When a power prescribes the mode in which it shall be exercised, that mode must be observed.

A power to appoint by deed cannot be exercised by will; nor can a power to appoint by will be exercised by deed. But a power to appoint by deed or instrument is writing, or by deed or writing, may be exercised as well by a will as by a deed (*i*).

And in favour of the objects who are peculiarly under the protection of courts of equity, viz. purchasers, creditors, wives and children, a court of equity will supply a defect of circumstances in the execution of a power.

In other words, when there is a declared intention of exercising the power, a court of equity will give effect to that intention, notwithstanding the omission of some circumstances. But when no step has been taken towards the execution of a power, a court of equity cannot, in the absence of all intention to exercise the power, consider the power as exercised.

[\*267] \*All that a court of equity can do is to supply a defect in the execution of the power. It cannot of its own authority execute the power.

The court of equity may therefore relieve when there is a defective attempt to execute a power; but cannot relieve when the donee of the power is passive, so that there is a non-execution of the power. Non-execution of a power is where nothing is done. De-

(*f*) *Coventry v. Coventry*, Str. Rep. 596; *Tollet v. Tollet*, 2 P. W. 489.

(*g*) *Coventry v. Coventry*, Str. Rep. 596.

(*h*) *Scholes & Lefroy's Rep.* 32—61.

(*i*) *Kibbett v. Lee*, Mob. 312; *Pulleney v. Darlington*, Cowp. 289.

fective execution is where there has been an intention to execute, and that intention sufficiently declared ; but the act declaring the intention is not an execution in the form prescribed (k).

So if a power require that a deed shall be signed, signature is essential to the valid exercise of the power, though not requisite by the general rules of law.

Also, when a power is required to be by deed "signed, sealed, and delivered, and attested," or to be by deed under hand and seal, and attested then, as already shown (l); the appointment under the power will not be valid unless the fact of signature, as well as of sealing and delivery, shall be attested (m).

But when a deed is required to be under hand and seal, or signed, sealed, and delivered, but the power does not require that the deed, or the facts of signing, &c. should be attested, then the appointment will be good, if it appear \*to be [\*268] signed, sealed, and delivered, although the attestation be silent respecting the mode of execution.

In one instance, attestation is essential to the valid exercise of the power ; and no proof of the mode of execution can be deemed a substitute for the want of attestation ; but in the other instance no attestation is requisite ; and it will be sufficient to prove the facts of signing, sealing, and delivering by the witnesses.

This is all the chancellor meant to say in *M<sup>c</sup>Queen v. Farquhar* (n), although from the language of the report it would seem that this observation was applied to an instrument made under a power which required attestation. This explanation was given by the chancellor on the argument of *Wright v. Wakeford* (o).

So if a deed be required to be enrolled, this ceremony must be observed ; and such enrolment must be made in the life-time of the party (p) ; unless a time be limited within which the enrolment is to take place ; and in that case the enrolment must be within the limited period.

So if a deed or will be required to be attested by a given number of witnesses, it must be attested by that number of witnesses ; and if it be prescribed that they should be of a given \*rank, as peers, or not of a given description, as [\*269] menial servants, this qualification must be observed.

And it frequently occurs that though the title be objectionable, as far as it depends on the power, it is good under the ownership. For example : lands are conveyed to such uses as A shall appoint by deed, &c. ; and in default of appointment, either immediately or ultimately, to A in fee, and A appoints, and also conveys ; the title, though objectionable under his appointment, may be good under the ownership.

4thly, In the exercise of a power created in favour of particular

(k) *Shannon v. Bradstreet*, 1 Schoales & Lefroy, 63.

(m) *Wright v. Wakeford*, 17 Ves. 464.

(o) 17 Ves. 464.

(l) 1 Vol. 279.

(n) 11 Ves. 467.

(p) *Digge's case*, 1 Rep. 173 ; *Hawkins v. Kemp*, 3 East, 410.

persons, as children, or *A B, C D*, and the like, the power must be exercised in favour of persons of that description.

A power to appoint to *B* will not authorize an appointment to *A* ; and a power to appoint in favour of children, will not warrant an appointment to grand-children.

But a power to appoint in favour of the issue of *A* will warrant an appointment to any of his descendants, provided the word *issue* be used in this collective and comprehensive sense.

It is a deduction from these observations, that a power to appoint in favour of children will not authorize an appointment to a child for life, with remainder to his first and other sons or children. But in wills, under the doctrine of *cy pres*, such an appointment [\*270] will, as to freehold \*lands, and for the purpose of giving effect to the general intention, be construed to give to the child who is the object of the power, an estate-tail corresponding with the gift to the donee and his descendants (*q*).

But the doctrine of *cy pres* is not admitted in limitations of leasehold or personal estate (*r*), or gifts of the fee-simple.

It was also considered as settled, that a power to appoint to *A* would not, except the language of the power was special, authorize an appointment to *B* in trust for *A* (*s*).

The late decisions however (*t*) have unsettled this point. But these cases, properly understood, cannot be carried farther than to admit that there is a good execution of the power in equity. It is impossible, it is apprehended, to support these cases as authorities for a valid exercise of the power at law.

So a power to appoint the land will not at law authorize an appointment of a charge. But in some cases equity will support the charge in favour of a wife, children or creditors.

Sometimes a power is to appoint among *all and every* the children, or among several persons, naming them ; or unto [\*271] and among such \*children begotten between us, and in such proportion as the wife shall appoint (*u*) ; and in these cases an exclusive appointment to one will be void (*x*).

However, an appointment of part to one, leaving a share not illusory, to go as in default of appointment, will be supported (*y*).

So if an appointment be of part to one, and then another appointment which is vicious, from the circumstance that it appoints the *whole* to one in exclusion of the others, in whose favour no appointment has been made ; the defect in the second appointment will not vitiate the former appointment. But the residue only which is de-

(*q*) *Humberstone v. Humberstone*, P. W. 338 ; *Robinson v. Harcastle*, 2 Term Rep. 241 ; *Pitt v. Jackson*, 2 Bro. C. C. 51.

(*r*) *Somerville v. Lathbridge*, 6 Term Rep. 213. (*s*) *Theobald v. Dye*, 2 Vern. 80.

(*t*) *Long v. Long*, 6 Ves. 445 ; *Kenworthy v. Bate*, 6 Ves. 799.

(*u*) *Alexander v. Alexander*, 2 Ves. sen. 640. Qu. this authority.

(*x*) *Malin v. Keighley*, 2 Ves. jun. 583 ; *Maddison v. Andrew*, 1 Ves. sen. 57 ; *Morgan v. Surman*, 1 Taunt. 289.

(*y*) *Routledge v. Dorrell*, 2 Ves. jun. 357.

fectively appointed will go, as it would have done in default of appointment (z).

And by express words, a *right of selection* may be given ; so that an appointment may be to any one or more of the objects, in exclusion of the other persons ; and it is frequently a question of construction, whether the power confer a right of selection.

It has been decided, that a power to appoint to such of my children as my wife shall think fit (u) ; or to one or more of my children as my wife shall think fit (b) ; or to or among \*such of my relations, in such parts, &c. as, &c. (c), will [\*272] confer this right of selection.

5thly, When the power specifies the estate to be appointed ; as, for life, or in tail ; for ninety-nine years, &c. that estate and no other can, at law, be effectually appointed ; but in some cases equity will support the appointment as far as it is within the scope of the power, and reject the excess, provided a line can be drawn between the limits of the power and its excess. This may be done in appointment for years, but not in appointments for lives, &c.

A power in terms, or in sound construction, to appoint in fee will not authorize an appointment in tail, nor the converse (cc).— And yet a custom to grant copyhold lands in fee, and *non aliter*, will warrant a grant of an estate-tail under the maxim, *omne majus in se habet minus* (d).

A power to appoint for life will not authorize an appointment of the inheritance, nor an estate for years determinable on lives (e).

Nor will a power to appoint for years determinable on lives warrant an appointment for lives ; one interest being of a chattel, and the other interest being of a freehold, quality. But a power to appoint for twenty-one years will authorize an appointment for twenty years ; and when the power is to appoint for any term, &c. \*not exceeding, &c. then care is to be taken [\*273] that the estate should not, in its duration, transgress the limits of the power.

6thly, Whatever other circumstances are required to the valid exercise of the power, as the reservation of rent, a condition, and the like, must be observed (f). A lease was made of land, of which the lessor was seised in fee, and of other lands of which he was seised for life, with a power of leasing at the best rent. The lease was at one entire rent, and therefore was not valid according to the power ; but it was held, that the lease was good after the death of the lessor for the lands in fee, though not for other lands, for the rent may be apportioned.

In short, the appointment must be consistent with the intention of the author of the power.

(z) *Routledge v. Dorrell*, 2 Ves. jun. 357.

(u) *Lieft v. Sallington*, 1 Mod. 189.

(c) *Spring v. Biles*, 1 Term Rep. 435, note.

(d) 2 Lord Raym. 939.

(f) *Doe on the demise of Vaughan against Meyer*, 2 Maule & Selw. 276.

(b) *Thomas v. Thomas*, 2 Vern. 613.

(cc) See Qualifications, Sug. 355.

(e) Sug. on Powers, 368.

It will be useful to advert to the distinctions between *general powers*, which are interests, and *special powers*, which are *authorities*.

General powers, being interests, are construed favourably. They may be exercised upon condition : a power of revocation may be annexed to appointments under these powers ; and the owner of this power may appoint in like manner as if he were the owner of the estate ; for instance, he may appoint to one for life, with remainder to his first and other sons, although such appointment [\*274] would not \*have been good if inserted in the deed by which the power was created.

This has been questioned by Mr. *Powell*.

But the conclusion is warranted by general and established practice.

So a general power to *A*, to appoint to such uses as he thinks fit, will enable him to make an appointment to such uses as *B* shall appoint ; not so of a power of nomination, which is a mere authority. Under a power of nomination, a person who has a power to appoint cannot, without an express authority, delegate the power to another.

It was formerly supposed that he could not reserve to himself a power of revocation and new appointment. It is now agreed that he may reserve such power (*g*). The effect of a revocation will be to revive the original power, so that it may be exercised again and again ; but it should seem that every subsequent appointment must be an appointment by virtue of the original power, and therefore must have all the circumstances required by that power.

So a person who has a mere authority cannot appoint to any person except those who are within the scope of the power ; and by the rule of perpetuities he is restrained from appointing to any person except those who might have taken under the will or settlement by which the power was created, in like manner as if [\*275] \*the limitations had been introduced into that settlement.

At one period it was doubted whether such power would warrant the appointment of an estate *for life* to a person unborn. It is now settled, as already shown (*h*), that it will. But with the restriction, that all limitations over will be too remote and void unless they are warranted by the language of the power ; and also unless they would have been good under the circumstances in which they are made, if they had been inserted in the will or settlement containing the power. A power to lease for lives does not authorize the nomination of lives not in *esse* (*hh*).

The true test, therefore, of the validity of any estate or interest made by way of appointment under a power of this sort, is to read the appointed interest as if inserted in the settlement itself ; and consider whether it would have been good if it had been introduced into that settlement ; and also, whether it be in other respects warranted by the power of appointment ; for if it be objectionable on

(*g*) *Hole v. Bond*, Prec. Cha. 474.

(*hh*) *Raym.* 263 ; *Doe v. Halcombe*, 7 Term. Rep. 713.

(*h*) p. 168.



either of these grounds, the title, as far as it depends on the appointment, will be defective.

Another rule applicable to these powers, and derived from the learning of authorities, is *delegatus non potest delegare*; in other words, a person who has a mere authority to appoint \*cannot confer on another person the power of exercising [\*276] that authority, either in his own name, or even as the attorney or substitute of the person to whom the power was given (i).

But the rule must be understood with the qualification that no power to delegate the authority is given. For as an authority may be delegated under an express power for that purpose, so may a power which partakes of the nature of an authority; and therefore it is agreed, that a power to *A*, or to his assigns, to lease for twenty-one years, may be exercised by the assignee (k).

So, beyond all doubt, a power to be exercised by *A* in person, or by attorney, may, in consequence of the express delegation, be exercised through the medium of the attorney, although this could not have been done under the general rules of law, without an express stipulation for the purpose.

It remains to be observed that powers are either of revocation or new appointment.

Every power to appoint does in effect include in itself a power to revoke. But a power to revoke will not authorize a new appointment; and therefore if *A* convey to uses, with a power to revoke these uses, and he exercise that power, he cannot raise any further uses by way of appointment. The effect of the revocation will \*be to revest the seisin in himself, discharged of [\*277] the uses.

To raise further uses there must be a new conveyance (l).

But on the contrary, when a man has a power of appointment, and he exercises that power with the addition of a power of revocation, this power is annexed to the uses introduced into the appointment; and by revoking the uses contained in the deed of appointment, there will be a revival of the original uses, and among them of the power of appointment.

It is obvious then that there is a material difference, on the one hand, between a conveyance to uses, with a power to revoke these uses; and, on the other hand, a deed of appointment, with a power of revocation, when such appointment and revocation are in exercise of a power contained in a deed of uses.

As a general summary, it may be observed, that titles depending on powers and authorities require attention in these several particulars:

It is to be seen,

1st, That there was a power or authority duly created:

2dly, That the power has been exercised by the persons to whom the power or authority was given:

(i) *Combe's case*, 9 Rep.; *Hawkins v. Kemp*, 3 East, 410.

(k) *Hovv v. Whitfield*, 1 Vent. 338, 339. (l) *Hele v. Bond*, Prec. in Chancery, 474.

3dly, That the power has been exercised in favour of persons capable of taking under the power :

[\*278] \*4thly, That the appointment is of a subject within the compass and extent of the power ; and in some instances it must be seen that there are not more, and in other instances that there are not fewer, parcels than are compatible with a due exercise of the power :

5thly, That the appointment is for such estates, &c. as were authorized or warranted by the power :

6thly, That all the conditions, ceremonies of signing, sealing, delivery, attestation, enrolment, &c. required by the power, have been observed.

And when a deed, will, or other instrument, cannot operate as a valid exercise of the power, it will be for consideration, whether the title can be supported under the ownership, which existed independently of the power of the intended appointers.

And as equity will, under circumstances, supply the defects in the execution of a power in favour of purchasers, wives, children, and creditors, there may be a good title in equity under the power and the intended appointment ; and the defect in the legal title will be supplied by that court.

These observations merely detail the principal *distinctions* to be regarded in considering titles depending on the exercise of powers. Whoever determines to take that comprehensive view of the subject which its importance merits, should investigate the law [\*279] through the \*medium of Mr. *Sugden's* book on Powers, and the collection of cases, &c. by Mr. *Powell*.

The annotations of Mr. *Builer* on Coke on Littleton, and his *Practical Observations*,\* contain an useful summary and general view of this subject ; a subject which, with reference to modern practice, demands more attention than any other head of the law.

As titles are either rightful or wrongful, it will be proper to consider the nature of seisin and disseisin ; conveyances which are rightful, and conveyances which are wrongful ; and the relative situation of disseisor and disseisee ; and the effect of the statute of limitations, and non-claim on fines, on titles which are wrongful.

As the title to the legal estate may be changed by disseisin, it will be in course to take a view of the general rules applicable to the law.

### *Of Seisin and Disseisin.*

THE doctrine of seisin and disseisin, though occurring every day in practice, and though involving the most important learning of titles, is rarely studied with the attention it deserves ; and it is lamentable to see how the law is sometimes applied in practice to sub-

\* A MS. of great utility, to which the present writer was, early in life, indebted for a large portion of information.

jects which involve this learning; taking modern notions \*of [\*280] convenience, and not principle, as the guide. The judgment in *Taylor v. Horde* (m), has confounded the principles of law, and produced a system of error.

All the difficulties of the law, all the niceties of title, all the higher branches of knowledge on the rules of property, are involved under this learning.

A schoolmaster, every village lawyer, may be excused for ignorance on subjects which never come under his notice, or cross his imagination; but it is truly lamentable to hear lawyers treat subjects of this importance as if they were unintelligible, or as if they were devoid of principle, or as if they were no longer of utility, or subservient to the purposes of justice.

Without recurring to the doctrine of disseisin how is it possible to apply the learning of titles as between man and man? or the operation of the statutes of nonclaim on fines; the bar by the statute of limitations; the learning of descents which toll entries; the change of the remedy from ejectment into a real action; or to understand the cases which render it necessary to consider a deed to be operative as a re-lease, and not as a conveyance: or as a deed which does, or as a deed which does not, admit of a declaration of uses?

With the fullest conviction of the importance of the subject, it will be worth while to bestow \*some time on this [\*281] branch of the law, and to consider,

1st, What constitutes a seisin; and what are the consequences of a seisin.

2dly, The different species of disseisin, and the consequences which are induced by disseisin; and under this head the difference between dispossession and disseisin will be considered:

3dly, The relative characters and situations of the disseisor and disseisee:

4thly, The means by which an estate which was wrongful may become rightful; or which was defeasible, may become indefeasible in point of title.

1st, What constitutes a seisin; and what are the consequences of seisin.

Seisin may be defined to be the feudal investiture, in other words, the completion of that investiture by which the tenant is admitted into the tenancy.

It is the consummation of an act, as descent; or of a conveyance.

When rightful, it induces that relation which establishes the connection between lord and tenant. The ownership, whether rightful or wrongful, is clothed with those requisites by which a man becomes actually seised, either in fact or in law; in other words, by which he obtains an estate, as distinguished from a contingent or executory

[\*282] interest on the one hand, \*and from a right or title of action, or of entry on the other hand.

According to Lord *Coke* (n), seisin signifies, in the common law, possession.

This observation was applied to a seisin in demesne. Such seisin is of the freehold ; but there may be a seisin in law of a reversion or remainder (o).

Mr. *Watkins* maintains, with great energy, that seisin is properly and strictly confined to the possession of the freehold.

Seisin is correctly investiture, or an estate in the land, according to the feudal relation.

Thus we have the phrases, 'seised in possession,' 'vested in possession,' 'seised in reversion or remainder,' 'vested in reversion or remainder.'

At all events, these are the phrases which practice has adopted to designate the qualities of different interests.

A man who has a seisin necessarily has an estate in possession, in reversion, or remainder. He has an interest which is transferable under the rules of the common law, in the modes prescribed by those rules.

As often as his estate confers a right to the possession he may transfer his estate by livery of seisin ; in other words, by feoffment ; by a fine which pre-supposes a feoffment ; by a fine or [\*283] common recovery, operating as a grant ; or by a \*lease and re-lease, which are said to countervail a feoffment ; that is, for all the purposes of conveyance, though not for collateral purposes, to produce the effect of a feoffment.

In point of fact, and in construction of law, the lease and re-lease, though parts of the same assurance, are distinct acts ; being in the first place a lease for years ; and secondly, a grant or re-lease in enlargement of that estate.

When the owner has merely an estate in reversion or remainder, he may transfer that estate by grant to a stranger, or by a re-lease or confirmation in enlargement of the estate of a particular tenant, when the estate of that tenant is so circumstanced that it admits of enlargement.

Contingent remainders and executory interests by devise ; or by shifting or springing use, are on the one hand to be distinguished from estates, and on the other hand from rights or titles of entry. These executory interests depend on the seisin ; are derivable out of it, and in fact constitute a part of the ownership ; while rights or titles of entry, or of action, are claims existing in opposition to the seisin, and depend on a distinct title. They are adverse and conflicting rights, depending on the title under a former seisin, which has been divested.

The interests under contingent remainders and executory devises

(n) 1 Inst. 153 a.

(o) *Watk. Descents*, 40, 41.

are devisable by will, but at law they cannot be granted to a stranger. They may, when the owner is ascertained, be \*re-leased to the owner or terre-tenant; that is, the person having the seisin; though they cannot be granted or re-leased to a stranger. [\*284]

They may be bound by estoppel, as by feoffment, fine, common recovery, or indenture of lease; and a contract made by this beneficial owner will be enforced in equity when the contingent remainder or executory devise shall confer a vested estate. This has been shown in former observations.

Disseisin is the privation of seisin. It takes the seisin or estate from one man, and places it in another.

It is an ouster of the rightful owner from the seisin (oo). It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner, and placed in the wrong-doer.

Immediately after a disseisin, the person by whom the disseisin is committed, and who is called the disseisor, has the seisin or estate; and the person on whom this injury is committed has merely the right or title of entry. This right, or title of entry, may, by a descent which tolls entry, by the bar of the remedy by ejectment under the statute of limitations, and, in some cases, by a release with warranty, be changed into a mere right of action; and ultimately may be barred or extinguished according to the difference of circumstances; by re-lease \*or confirmation; by warranty; by nonclaim on a fine; or by the operation of the statute of limitations. [\*285]

As soon as a disseisin is committed the title consists of two divisions; first, the title under the estate or seisin; and secondly, the title under the former ownership; and these distinct interests must be kept steadily in view till they are united, or the right is barred.

There are four species of disseisin:

1st, Disseisin properly so termed:

2dly, Abatement:

3dly, Intrusion:

4thly, Discontinuance or forfeiture.

The three first sorts of disseisin proceed from strangers; and to this purpose even a remote heir is a stranger. The fourth sort proceeds from a person already in the seisin, but having only a particular estate.

Actual disseisin is against the person who actually has the freehold (p); while abatement is against the heir, in the interval between the death of the ancestor and the entry of the heir, while he has merely a seisin in law; and intrusion is against a person who has a seisin under a reversion or remainder, and not the actual seisin

(oo) Litt. § 279; 1 Inst. 181 a.

(p) Litt. § 279.

of the freehold, in the interval between the death of a person who has a particular estate, and the entry of the person who has [\*286] the reversion or remainder ; and \*discontinuance and de-forcement are disseisins arising from the alienation of a particular tenant, to the prejudice of those who have an interest in remainder or reversion expectant on his estate.

3dly, Of the different sorts of disseisin.

Disseisin, simply so termed, is an entry by a stranger on the possession of the person who by himself or his tenant (pp) has the actual freehold, and an ouster of that person.

The law always favours the rightful owner, and considers him in the seisin as often as this can be done consistently with the fact.

The maxim is *duo non possunt in solido, unam rem possidere* (q). Thus, an actual and formal disseisin is a wrong by which the actual seisin is divested, by the act of a stranger entering on the rightful owner ; or at least on the person having a right to the possession.

Therefore, when two persons are in possession, and one of them only has the right, the law will consider the seisin to be in that person alone who is the rightful owner.

In this case the stranger is merely in possession ; he has no seisin ; or, in law, possession. He may be a *trespasser*. He may be a disseisor only at election ; but he is not an actual disseisor (r).

Disseisin at election is not a disseisin in fact. A large [\*287] portion of the learning in the books is \*calculated to mislead, rather than inform, the reader. In cases of disseisin at election the rightful owner has in reality the actual seisin, and supposes himself to be disseised solely for the purpose of trying the title in an assise, instead of bringing an action of trespass.

Where a man is in possession of his house, or his farm, no entry on him by a stranger can be a disseisin to him ; for, though there be an actual entry, yet, while the rightful owner continues in possession by himself or his tenant, the seisin cannot be changed ; or gained as against him.

By construction of law, the possession of a *tenant*, even for years, is the possession, or rather the continuance, of actual seisin (s) of those in reversion or remainder, except as between different persons claiming as heirs (t) ; and the continuance of seisin by tenant for life, or in tail, or of any other particular estate, is the continuance of seisin to those in reversion or remainder. Hence the following passages :

(u) " If *A* of *B* be seized of a *mese*, and *F* of *G*, that no right hath to enter into the same *mese*, claiming the said *mese*, to hold to him and to his heirs, entereth into the said *mese* ; but the same *A*

(pp) Litt. § 279.  
(s) 1 Inst. 243 a.

(q) 1 Inst. 368 a.  
(t) 1 Inst. 368 a.

(r) Litt. § 701.  
(u) Litt. § 701.

of *B* is then continually abiding in the same *mese*; in this case, the possession of the freehold shall be always adjudged in *A* of *B*, and not in *F* of *G*; because, in such \*case where two [\*286] be in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements [except the rightful owner had merely a right of action, and not of entry; and also, except an entry by two daughters, one being bastard *eigne*, the other *mulier puise* (x)]. But if in the case aforesaid, the said *F* of *G* make a feoffment to certain barretors and extortioners in the country, to have maintenance from them of the said house, by a deed of feoffment with warranty, by force whereof the said *A* of *B* dare not abide in the house, but goeth out of the same, this warranty commenceth by disseisin, because such feoffment was the cause that the said *A* of *B* relinquished the possession of the same house."

So (y) "as long as the donee in tail, lessee for life, or lessee for years, are in a possession, they preserve the reversion in the donor or lessor; and so long as the reversion continue in the donor or lessor, so long do the rents and services which are incident to the reversion, belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unless the donee or lessee be put out of their possession; and if the donee or lessee be put out of their possession, then consequently is the \*donor or [\*289] lessor put out of their reversion. But if the donee or lessee make a regress, and regain their estate and possession, thereby do they *ipso facto*, [except the entry of the reversioner be tolled (z),] revert the reversion in the donor or lessor.

And (a) "when a man hath a reversion he cannot be ousted of his reversion by the act of a stranger, unless that the tenant be ousted of his estate and possession, &c.: For as long as the tenant in tail and his heires continue their possession by force of my gift, so long is the reversion in me and my heires; and in as much as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion shall have the same rent and services, &c. (b)."

And if a termor for years be ousted, and the reversioner be disseised, and the tenant for years re-enter, his re-entry will restore the seisin to the reversioner.

But if a descent cast has taken away the right of entry of the reversioner, then the entry by the termor will not revive the seisin to the reversioner; but the seisin will remain in the disseisee, or his heir, or alienee (c), subject to the right of the reversioner to recover the seisin by action; and the relation of landlord

(x) 1 Inst. 368 a.

(z) Litt. § 411.

(y) 1 Inst. 324 b.

(a) Litt. § 590.

(b) *Roe v. Elliott*, 1 Selwyn & B. 85; and see the stat. which renders attornments by tenants void, 11 Geo. II. c. 19. § 11.

(c) Litt. § 411.

[\*290] \*and tenant will be suspended until the seisin be recovered by the reversioner, or he be remitted to the same.

Therefore (d), if I let unto a man certain lands for the term of twenty years, and another disseiseth me, and oust the termor, and die seised, and the lands descend to his heir, I may not enter; because that by his entry he doth not oust the heir who is in by descent of the freehold which is descended unto him, but only claimeth to have the lands for term of years, which is no expulsion from the freehold of the heir, who is in by descent.

Had there been tenant for life, with remainder or reversion in fee, then the re-entry of the tenant for life would of necessity have restored the seisin to the owner of the remainder or reversion (e).

As a deduction from these principles, no man can make a feoffment of the lands while they continue in the actual seisin of another person; and though the lands are in the possession of a tenant, and even of his own tenant, he cannot make livery of seisin without the permission and sanction of the tenant. A feoffment by a person who has a remainder or reversion after, and expectant on, an estate for life, even with the consent of the tenant for life, will be void as a feoffment, and therefore will not divest the [\*291] seisin (f). The general practice is to turn the \*tenant out of possession, and then to make the livery; but it is now agreed, that the consent of the tenant for years in possession will be sufficient to enable the reversioner to make a feoffment (g).

It is also a rule of law, that the seisin of one joint-tenant is the seisin of his companion as well as of himself.

The same rule is applied to coparceners and tenants in common. The possession of one of them is constructively the possession of all; and hence it seems to follow, that possession or seisin of one will be the seisin of others, as against all strangers; and the possession of one will constructively be held for the benefit of himself and of his companions.

To disseise his companions there must be an actual ouster, or there must be such acts as are constructively equivalent to an ouster; as the denial of right to the rent of any part, or the possession of any part of the land, or an exclusive possession for a long time, so as to afford the presumption of a disseisin.

In modern times the rule has been relaxed at some periods, and enlarged at other periods, in deciding on the point of ouster by one joint-tenant, tenant in common, or coparcener of his companions (h).

[\*292] But though a stranger cannot gain an actual \*seisin against the owner without ousting him or his tenant (i), or

(d) Litt. § 411.

(f) *Edwards v. Rogers*, Sir W. Jones, 456.

(h) *Doe v. Prosser*, Cowp. 217; *Royton v. Reading*, 1 Salt. Rep. 242; 1 East, 574; Hob. 120; 1 Rol. Abr. 658, C. pl. 2.

(e) Litt. § 411. 416.

(g) Dyer, 33.

(i) Litt. § 411.



without entering on lands which are unoccupied ; yet, in favour of the right, the person who may lawfully enter may restore his seisin by an actual entry, without turning the person in the actual seisin out of possession. Thus, if a man has disseised me, and I *retain my right of entry* (k), and enter on the land, claiming the same, the seisin vests immediately in me ; and if I am again ousted, that is, denied the occupation by the person in possession, this will be a *re-disseisin* (l), and even change an estate-tail by defeasible title into a fee-simple by disseisin (m) ; but the seisin which was obtained by this entry will be useful for many purposes, particularly to gain a seisin on which a writ of right may be maintained ; also as a seisin by way of continual claim, which will preserve the right of entry against those descents which, under other circumstances, would toll the entry.

Instances, as examples of actual disseisin, are,

1, An entry on a vacant possession, claiming the land :

2, An entry on the rightful owner, and ouster of such owner, and of his termor, if any (n) :

3, An entry under a defective conveyance (o), or under a void will, or by an heir, when there is a devisee (p) :

\*4, An entry under the lease of a person who had no [\*293] title (q) :

5, A feoffment by a stranger, a tenant at will, for years, &c. (r), or for life (s).

For every feoffment must be founded on a rightful or wrongful possession of the land.

But an entry on land, while the owner is in possession by himself, his bailiff, or his tenant ;

Or an entry to receive livery of seisin (t) ;

Or an entry at the invitation, or an entry as tenant, with the consent or the permission of the rightful owner (u) ;

Or the receipt of rent from my tenant, while he remains my tenant, (x), is not an actual disseisin.

Every disseisin gains the fee, except in the special case of there being a particular estate ; and an entry is made on the land, claiming that particular estate, in opposition to the owner of the particular estate (y).

At the same time that the law admits of this exception, the general rule is, that a man cannot qualify his own wrong (z).

And if a man enter claiming a particular estate, when in point of fact there is not any such estate, then the disseisin is, of necessity, of the fee ; for in things in *esse* there cannot

(k) Litt. § 411.

(l) Litt. § 430.

(m) Litt. § 429.

(n) Litt. § 411.

(o) 2 Rep. 55.

(p) *Hulm v. Heylock*, Cro. Car. 100.

(q) *Blundell v. Baugh*, Cro. Car. 302.

(r) 1 Inst. 330 b. 367 a.

(s) 1 Inst. 327 b ; even though the lessor be on the land, so as he do not oppose it ; Dyer, 302, pl. 20.

(t) 1 Inst. 56 a.

(u) 1 Inst. 308 a.

(x) Litt. § 598.

(y) 2d vol. of Preston's *Practices of Conveyancing*.

(z) 1 Inst. 271 a.

[\*294] \*be a particular estate without a reversion or remainder (a); and a particular estate cannot be *created* by claim or entry.

So if a man enter claiming to hold *at will*, he will be a disseisor, unless the rightful owner will accept the claimant as his tenant (a a). The language of Lord *Coke* is,

"If a man entereth into land of his own wrong, and take the profits, his words, to hold it at the will of the owner, cannot qualify his wrong; but he is a disseisor, and then the re-lease to him is good; or if the owner consented thereunto, then he is a tenant at will, and that way also the re-lease is good."

But if the right of entry be taken away, then the disseisee cannot lawfully enter on the disseisor; the right of possession is in the disseisor; and though the disseisee should obtain the possession, yet the disseisor may recover the possession from him by ejectment. A case of this sort was lately argued in the King's Bench. Mr. Justice *Dampier* had, at the assizes, ruled in favour of the disseisee, but with the manly candour and liberality, for which he was so eminently distinguished, he was the first to express a doubt of the accuracy of this conclusion. The text of *Littleton* (b), had it occurred to the learned counsel, would have brought a long argument into a narrow compass.

[\*295] \*Every *dispossession* is not a disseisin; A disseisin must be an ouster of the freehold. A dispossession may be without any ouster of the freehold. While the rightful owner is in the possession there is not any dispossession; because the law provides that when two persons are in possession the seisin or estate shall continue with the rightful owner.

And if a man enter on a vacant possession, and claims to hold it as bailiff, or as agent, this is no dispossession. The possession of the bailiff or agent is constructively the possession of the rightful owner.

The language of *Littleton* is, "also, if a man be disseised, and the disseisor dieth seised, &c. and his son and heir is in by descent, and the disseisee enter upon the heir of the disseisor, (which entry is a disseisin) if the heir bring an assize, or a writ of entry, in nature of an assize, he shall recover." In a writ of right he would have failed (c).

But if a stranger enter on a vacant possession, claiming the land as his right (c c); or if the younger brother enter claiming to be heir, this will be a disseisin to the rightful owner (d).

But if there be an existing term of years, and a person enter claiming the term, this entry will be a *dispossession*, and not a disseisin. It will be adverse to the rightful owner of the term,

[\*296] and not to the freeholder. The possession \*is consistent with the estate of the reversioner or remainder-man.

(a) Litt. § 620, 676, 577. (a a) 1 Inst. 271 a.

(c c) *Plaff's case*, 1 Rolle's Abr. 659.

(b) § 436.

(d) Litt. § 506.

(c) Litt. § 437, 438.

But if there had not been any such term as that which is claimed, or if the person who entered had entered generally, he would have ousted the lessee, and disseised the reversioner or remainder-man (d).

And from *Perkins* (e), it is evident, that notwithstanding there be a lessee for years, there may, by the ouster of the lessee, be a disseisin of the freeholder.

*Littleton* also admits the law to be (f), that there may be a disseisin of the reversioner by an ouster of the termor for years under a claim of the fee.

### *Abatement.*

ABATEMENT is a wrongful entry by a person when the possession is vacant on the death of an ancestor, who died seised; so that an abatement is a disseisin of an heir at law before he has obtained an actual seisin (g). It is a disseisin by the entry of a stranger in the interval between the death of the ancestor and an entry by the heir.

On the death of a person seised in fee, or in tail (h), the inheritance descends *instantly* to his heir at law. The heir has immediately a seisin in law, but not a seisin in fact.

To obtain an actual seisin he must enter on the lands, or receive the rents of the tenant.

\*In the mean time he has merely a seisin in law, and a [\*297] seisin in law will not enable him to maintain a writ of right, or any other writ founded on his own seisin; but let him enter even for a moment, or let him gain an actual seisin by perception of the rents and profits from his tenant, and he will obtain an actual seisin, sufficient to enable him to maintain an assise, a writ of entry sur disseisin, or even a writ of right (g).

While he has merely a seisin in law, and before that seisin is disturbed by abatement, the heir has a complete ownership for all the purposes of dominion, and conveyance by deed or will (h).

A wife may be dowable of this seisin, &c. but if the marriage be after the abatement, then no title of dower will arise. And if any stranger enter before the heir has obtained an actual seisin, such entry will be an entry by abatement on the seisin of the heir. The remedy of the rightful heir will be by ejectment, founded upon the fiction of a demise, and the confession of lease, entry, and ouster; or it will be by a writ of entry sur abatement, of which there is a precedent, with a detail of the proceedings, in the case of *Smith v. Coffin* (i).

If a guardian hold over adversely he is an abator (k).

\*Whether an abatement may be effected by a perception of rents and profits from a termor for years, as well as by an actual entry, may be doubted. The general rule is, that the

(d) Litt. § 411.

(e) § 320.

(f) § 411.

(g) 1 Inst. 277 a.

(h) Perk. § 383.

(g) Litt. § 397.

(h) Perk. § 383.

(i) 2 Hen. Black. 444.

(k) 1 Inst. 271.

possession of the termor is the possession of him in reversion or remainder ; and it may be contended, that the payment of the rent is merely a payment in the tenant's own wrong, and not a disseisin to the heir. What is to hinder the heir from distraining for the rent thus withheld from him, though wrongfully paid to another ? But see p. 299.

It is to be remembered, that an entry by one of several coparceners is *prima facie* an entry for the benefit of all of them ; so an entry by a remote heir is presumably an entry for the benefit of the rightful heir, and for that reason no abatement. But it is apprehended that one of several coparceners, or a remote heir, may enter specially, and commit a disseisin ; thus, a coparcener may be rightfully seised for his own share, and seised by *abatement* of the shares which he claimeth adversely (*kk*).

The person who enters thus wrongfully will gain a seisin.

The abator has a wrongful estate ; and such estate can become rightful only by a re-lease of the person who is the heir, or by the heir being barred of his title by non-claim on a fine, or by [\*299] the statute of limitations. Such \*heir must pursue his entry within twenty years, unless labouring under disabilities, or within ten years after his disabilities are removed. But he may maintain a writ of right on the actual seisin of his ancestor at any time within sixty years ; or he may maintain other remedial writs within other shorter periods ; as a writ of *aiel*, &c. within fifty years, a writ of entry *sur abatement*, &c. within thirty years on his own seisin, or within fifty years on the descent of the right from any ancestor.

The title, as derived from an abator, must be considered as defective till it can be shown that the remedy of the heir is barred by the statute of nonclaim on fines, or the statute of limitations, or is effectually extinguished by a re-lease of right ; or that the title is established by a confirmation.

On this head the Commentaries of Mr. Justice *Blackstone* (*k*) ; the Commentaries of Lord *Coke* ; and *Booth* on Real Actions, are the works which alone contain this profound learning. Even one coparcener may be an abator to another coparcener (*l*) ; and a more remote heir may be an abator to a more near or immediate heir (*m*).

It should seem there may not be an abatement if the possession be in a tenant for years (*n*).

[\*300]

\* *Intrusion.*

INTRUSION is a wrongful entry when the possession is vacant by the determination of a prior particular estate ; or, according to Lord *Coke* (*o*), " Intrusion is when the ancestor died seised of any estate

(*k k*) 1 Inst. 243 b.

(*k*) Vol. 3. c. 10.

(*l*) Litt. § 398.

(*m*) Litt. § 396, 397, 398 ; 1 Inst. 242 b. 243 a. b.

(*n*) 1 Inst. 243 a.

(*o*) 1 Inst. 277.

of inheritance expectant upon an estate for life ; and then the tenant for life dieth, and between the death and the entry of the heir an estranger doth interpose himself, and intrude." But according to *Booth*, it is not necessary that there should have been a descent as a foundation for an intrusion (*p*).

Intrusion takes place under the like circumstances as abatement. The only difference is, that intrusion is an entry to the prejudice of a person who has a seisin in law, in reversion or remainder, after a particular estate of freehold ; while abatement is an entry on a person who has a seisin in law, merely in the character of heir.

Thus, as far as is material to these observations, an intruder is a person who on the death of a particular tenant enters, without having any right to the prejudice of the person who has a seisin in law of the reversion or remainder.

It is a species of disseisin, and differs from a disseisin only in this circumstance, it divests a seisin in law, instead of divesting a seisin in fact.

\*The remedy for the reversioner or remainder-man is by [\*301] entry, or by ejectment, which pre-supposes a lease, entry, and ouster, or by writ of entry *sur intrusion* (*q*).

An entry on the death of a testator to the prejudice of his devisee, would be merely a disseisin, or rather a *deforcement*, and not an abatement ; nor would it be deemed an intrusion in the technical sense of that term. But there are distinctions on this point : for example ; if *A* be tenant for life, with remainder to *B* in fee, and afterwards *B* devise to *C* in fee, and then *A* dies, and a stranger enters to the prejudice of *C*, the devisee of *B*, this entry would be an intrusion as against *C* ; not because *C* is a devisee under *B* ; but because the seisin of *A* was a seisin in law, to *C* ; and the entry of a stranger was by intrusion on the seisin of *C*, as expectant on a previous life estate.

In short, a devisee cannot maintain any real action grounded on the seisin of a testator. In case such seisin was defeated or disturbed in the life-time of the testator, so as to be converted into a right of entry or of action, there would be a revocation of the will (*r*).

In the first place, a right of entry or of action is not devisable ; and secondly, a devisee does not represent a testator in the same manner as an heir represents an ancestor, so as to enjoy the privity of all actions, &c. Hence the *doctrine of descents* [\*302] which take away entry does not apply to a devisee who has merely a right of entry, and cannot maintain a real action (*rr*). But on this occasion, again it must be called to mind, that a *devisee* may have actually entered, or obtained an actual seisin, and, afterwards, for all the purposes of right or remedy, he will stand in the same situation as any other person would, by obtaining actual seisin, have stood.

(*p*) *Booth on Real Actions*, 181.

(*r*) *Bunker v. Cooke*, Gibb. Dev. 126 ; 1 Salk. 257.

(*rr*) 1 Inst. 111 ; 2 Schoales & Lefroy, 623.

(*q*) *Booth on Real Actions*, 181.

When the heir enters on the title or seisin in law of the devisee, he does, in point of effect, become the disseisor of the devisee. It is a deforcement, and not an actual disseisin; neither is it an abatement or intrusion. But an entry by virtue of a will which is bad, either for forgery or any other cause, is strictly and properly an abatement, gaining a seisin from the heir at law; for the devisee is in the same situation as an actual stranger. An heir at law may levy a fine after an actual entry, so as to gain a title by nonclaim against a devisee, to whom the lands were effectually given by a will, and who neglects to enter in support of his title. So a man who enters by colour of a devise which is void, and levies a fine with proclamations (s), may eventually bar the rightful heir under the statutes of nonclaim. It follows that he must have gained [\*303] the freehold by his entry. It is also to be \*remembered, that in *Goodright v. Forrester* (t), devisees, asserting a title under a disseisee, were considered as in *loco hæredis*, so that nonclaim on a fine would run against them, though claiming under successive interests, in the same manner as it would have run against the heir; and so that five years nonclaim would bar all devisees claiming under the testator. This point assumes that a right of entry is devisable; a doctrine which is not to be easily admitted, and which is in opposition to all sound policy and all the principles of law.

In one sense an intruder is a person who intrudes on the possession of the king (u); and that act which as to a subject would be deemed a disseisin, is, as to the king, merely an intrusion; so that the king retains the seisin; for the king cannot be disseised.

#### *Discontinuance.*

DISCONTINUANCE is the fourth species of disseisin; it is a wrongful alienation by the owner of a particular estate of inheritance, namely, tenant in tail; who is, or at the commencement of the discontinuance (x) was, seised of the freehold by force of the entail (xx). By such discontinuance a seisin under a new title [\*304] is acquired; and, as a consequence, the seisin under \*the estate-tail, and the remainders, or reversion expectant on that estate, are discontinued.

Discontinuance may be defined to be the cesser of seisin under one title, by introducing a seisin under another title. Formerly a discontinuance might have been effected by persons seised in right of their church, or by husbands seised in right of their wives; and, in strictness, both these species of discontinuance still exist in law.

The statutes which have restrained alienations by husbands seised in right of their wives have not rendered the alienations actually void;

(s) *Supra*, 282. (t) 1 Taunt. 578. (u) 1 Inst. 277. (x) Litt. § 628, 629.  
(xx) *Peck v. Channell*, Cro. Eliz. 627; Litt. § 612, 637, 638.

they have merely changed the remedy for redressing the injury, by giving a right of entry in the place of a right of action.

In regard to husband and wife, a feoffment, fine, or common recovery, by a husband alone, seised in right of his wife, was a discontinuance of her estate; it converted her estate into a right of action; and put her, and her heirs, to the trouble and expense of a real action, *the cui in vita*; and consequently she was without remedy by actual entry. The statute of 32 Hen. VIII. c. 28, has restrained discontinuances by husbands seised in right of their wives, so far only that it enables the wife, or her heirs, to enter after the death of her husband, and to restore her seisin or estate by an entry without an action. /

It does not abridge the estate which her \*husband might [\*305] have conveyed before the statute by means of a discontinuance. Now, a feoffment, fine, or common recovery by husband, seised in right of his wife, will pass tortiously, and by wrong, an estate in fee-simple; and the estate of the alienee will not determine by the death of the husband, but it will continue until the wife or her heirs shall have restored the seisin by an entry. In the mean time, till entry, or a remitter, the wife or her heirs will have merely a right of entry, as distinguished from an estate; and a fine or recovery by the wife or her heir before entry will be an extinguishment by *estoppel* of the right or title of entry; and of this estoppel advantage may be taken by the person who has the seisin or estate, although he be not a party to the fine or recovery (x).

But if the right of entry be barred by the statute of limitations, then the wife or her heirs must resort to the remedy by real action.

Discontinuance is emphatically applied to the tortious alienation of tenant in tail. It may be made by those persons alone who are seised of the *freehold* by force of the entail (y). It cannot be made by the concurrence of a tenant for life, and of a remainderman, or reversioner in tail; nor can it be made \*by a [\*306] person who has an estate for life, with a remainder or reversion in tail, after an estate of freehold, between the estate of freehold, and the estate of inheritance of the tenant in tail.

Nor can it be made by a person who has an estate-tail in reversion or remainder expectant on a prior estate of freehold, or of inheritance (z).

Nor can it be made by a person who has a base fee, although this base fee be derived from the ownership of a person who had an estate-tail in possession; and hence it seems to follow, that a fine levied by a person who has a base fee, never can, in any event, operate as a bar by nonclaim; for let the authorities be properly considered (zz), and the result from them will be, that a fine will never become a bar by nonclaim, as against any person, unless the

(x) *Moore's case*, *Palmer's Rep.* 365.

(y) *Litt.* § 615; 1 *Inst.* 332 a; *Doe dem. Odiarne v. Whitehead*, 2 *Burr.* 704.

(z) *Litt.* § 615.

(zz) 10 *Rep.* 95.

estate of that person has been previously devested or discontinued (a); or it shall be devested or discontinued by the operation of the fine. Tenant in tail by levying a fine may devest and discontinue a reversion or remainder (aa); hence the fine may eventually become a bar by nonclaim to the persons in reversion or remainder; but let him levy the fine under circumstances which deny him the power of divesting or discontinuing the reversion [\*307] or \*remainder, and his fine, so far from prejudicing the persons in reversion or remainder, may be used by them, and by those who have his estate, as a bar to those persons who have a title adverse to that on which the estate-tail and the reversion and remainder depend.

On the same principle, it seems to follow, that as a fine by a person who has a base fee cannot devest the reversion or remainder, the fine levied by the owner of a base fee never can, after the determination of the base fee, be used to the prejudice of the persons in reversion or remainder, by the person who had the base fee, or any persons claiming under him (b).

The case of a base fee is an instance in which a fine by a person may be a bar to the issue in tail, without being a bar against those who have a reversion or remainder expectant on the determination of the base fee; *ex gr.* if *A* be tenant in tail, and make a conveyance by lease and re-lease to *B*, this conveyance would pass a base fee; and a fine levied by *B* during the continuance of the base fee, may eventually be a bar to the issue in tail of *A*, since his possession is adverse to their title; but the fine so levied never can, in any event, be a bar to the persons in reversion or remainder; since their reversion or remainder was not devested or discontinued at the date of the fine, or by its operation; but suppose the [\*306] estate-tail to be \*spent, and *B* to continue in the seisin, and to levy a fine, this fine might bar the reversioner or remainder-man; since there would be a disseisin by the continuance in possession, and also a title adverse to those who had the reversion or remainder. And yet, generally, a mere continuance of possession after an estate is determined will not be a disseisin.

The case of a guardian holding over against the heir is another instance of disseisin by continuance of possession (c).

There are other cases in which a fine may operate as against one person, without affecting other persons, as in the case of *A*, tenant for life, remainder to *B* in fee. *C*, by entry on *A*, and claiming his estate, would acquire that estate by disseisin, without disturbing the seisin of the reversioner or remainder-man (d).

The effect of a discontinuance by tenant in tail is to pass a fee-simple under a new and wrongful title, while a mere grant or re-

(a) *Prodger's case*, 9 Rep. 106 a; *Edwards v. Rogers*, Sir W. Jones, 456.

(aa) 1 Inst. 832 a.

(b) *Fucus v. Salisbury*, Hardres's Rep. 400; *Carhampton v. Carhampton*, 1 Irish Term Rep. 567.

(c) 1 Inst. 271 a.

(d) 1 Inst. 275, 276.



lease by a tenant in tail, which does not produce the effect of a discontinuance (e), passes a base or determinable fee, commensurate only with the ownership under the estate-tail; and unless this fee be enlarged by a common recovery, the estate as a base fee will determine at the same time, and under the same circumstances, as it would have determined in case it had remained an estate-tail.

\*A mere grant, a bargain and sale, or a lease and re- [\*309] lease, or a covenant to stand seised, even by a tenant in tail in possession, or fine, though with proclamations, or a fine by a tenant in tail in remainder or reversion expectant on a prior estate of freehold, as distinguished from an estate for years (f), will not pass more than a base fee (ff), as has already been shown.

But a lease, re-lease and fine, from a tenant in tail in possession, and being parts of the same assurance, will create a discontinuance (g).

A lease, re-lease and fine, being parts of the same assurance, are considered as a fine, and the declaration of the uses of the fine; but when a tenant in tail makes a conveyance by lease and release, or bargain and sale, and afterwards, at a distinct period, and as an independent transaction, levies a fine, there will, in the first instance, be a base fee, and the fine will merely give stability to the title as against the issue; and against them only when the fine is with proclamations, by confirming this base fee, without altering the quantity or quality of the estate conveyed by the lease and re-lease, or bargain and sale (h).

From these observations, a conclusion may be drawn, that an estate-tail converted into a \*base fee cannot be dis- [\*310] continued so as to be changed into a fee-simple; and although it be true that a base fee may be converted into an estate in fee-simple by a common recovery duly suffered by the tenant in tail, or after his death by the heir under the entail, yet such recovery does not operate by discontinuance, properly so termed; but this change is from the peculiar operation of the common recovery merely and simply as a bar to the reversion or remainder, by placing the title on the footing of the ownership under the estate-tail.

Indeed a common recovery, duly suffered, is rather a conveyance by tenant in tail than a discontinuance by him.

In strict propriety, a common recovery operates as a discontinuance in those instances only in which it wrongfully displaces or de- vests the reversion or remainder without effecting a bar to those estates.

Hence a condition which restrains a discontinuance is valid; while a condition which restrains a conveyance of tenant in tail by means of a common recovery is repugnant to the privileges incident to the estate of tenant in tail (i).

(e) Litt. § 613. 615.

(f) See *Seymour's case*, 10 Rep. 95; and *Machel v. Clark*, 2 Raym. 778.

(g) *Doe dem. Odierne v. Whitehead*, 2 Burr. 704.

(h) *Seymour's case*, 10 Rep. 95.

(i) *Portington's case*, 10 Rep. 42; *Butler's Fears*, 255, 260.

A warranty may, under the circumstances already noticed, produce the effect of a discontinuance, as the means of giving effect to the warranty.

[\*311] \*Let it be remembered too, that an intrusion on the seisin of the reversioner or remainder-man has all the effects, and produces all the consequences, of a disseisin of a person actually seised ; for after a disseisin, an abatement, or an intrusion, the wrong-doer obtains the actual seisin, while the rightful owner retains merely a right of entry, which may eventually be converted into a right of action, or which may be restored to an actual seisin by the means which will afterwards be noticed ; and each of these three species of disseisin differs from a discontinuance by tenant in tail only in the circumstance that a discontinuance must proceed from the owner of an estate of inheritance, so that the alienation will be good as against himself, however defective it may be as against those in reversion or remainder.

It follows, that a discontinuee, though he come into the seisin under a wrongful act, will have a right to hold the lands until the issue in tail shall, by the death of the tenant in tail, or the persons in reversion or remainder shall, by failure of issue, acquire a complete and perfect right to avoid the discontinuance, and regain the seisin.

In the course of these observations reference has frequently been made to the different operation of the several assurances, as against tenant in tail himself, his issue, and those in reversion or remainder.

[\*312] To sum up these distinctions, and supply an \*accidental omission of part of the MSS. in the former part of the work—

#### *As to Tenant in Tail himself.*

As against tenant in tail himself, and all persons claiming under him, except his issue, (for they are considered as claiming under the statute *de donis* and *per formam doni*.) the rightful alienation, and charges of tenant in tail, will have precisely the same effect as if they were the alienations and charges of tenant in fee-simple.—The tenant in tail may even be bound by estoppel, so that a conveyance may be good as against himself, though it is informal and irregular as against his issue. Thus, if tenant in tail in remainder, after an estate for life, suffer a common recovery without the concurrence of the tenant for life, this recovery is voidable as against the issue, and those in remainder or reversion ; but it should seem that it is good between the parties, operating as a conveyance, or by way of estoppel, so that the legal estate of tenant in tail passes to the demandant in the recovery, and the uses may arise on his seisin.

#### *As to the Issue.*

SOME acts and assurances are actually void against the issue, as

a covenant to stand seised after the death of tenant in tail, judgments, and the like charges.

Other acts are voidable only, and those which \*are [\*313] voidable may be affirmed *quoad* the particular issue, by acceptance of rent, or by any other act by which the conveyance of tenant in tail is affirmed.

The issue may also be barred altogether, or partially, by a fine with proclamations, levied by any person to whom they are privy, *quoad* the estate-tail, or by a common recovery, or under the circumstances which have been mentioned, or by the bankruptcy of tenant in tail, and a bargain and sale by the commissioners.

In some cases also, as has already been noticed, they may be bound by warranty, and in some cases with assets, and in other cases without assets.

And they may be barred by the attainder of the tenant in tail for treason.

A common recovery is a complete bar to the entail when duly suffered ; so is a fine with proclamations, which imports to pass the inheritance generally.

But a fine for years, with proclamations, or a lease for (h) lives, warranted by the statute of Hen. VIII. though that lease be made by livery of seisin, will bind the issue only *quoad* the term which is granted ; and the reversion subject to the term, and also the rent, if any annexed to the reversion, will descend to the issue in tail.

A warranty is not a bar to the entail, but only to the person who for the time being is the issue in tail, and bound by the lien of the warranty.

\*Although an alienation by the tenant in tail may be [\*314] voidable, in the first instance, by the issue, or those in remainder or reversion, it may eventually become good by some act by which the issue, or those in reversion or remainder, shall be eventually barred or bound, as far as they shall be so barred or bound (i).

*As to those in Remainder or Reversion.*

An alienation of tenant in tail by deed, except a discontinuance be created, either from the nature of the assurance, as a feoffment or fine by tenant in tail in possession (k) or by reason of a warranty, is absolutely void as against the persons in reversion and remainder ; and the estate will determine, *ceteris paribus*, when the estate-tail shall determine by the death of tenant in tail, and failure of the issue inheritable to the estate-tail.

Nor has a fine any effect, as a conveyance distinguished from a discontinuance, against those in reversion or remainder ; and therefore if tenant in tail, by deed or fine, make a lease for years, or a

(h) 1 Inst. 333 a.

(i) See *Goodright v. Mead*, 3 Burr. 1705 ; *Stapleton v. Stapleton*, 1 Atk. 2.

(k) Litt. § 559 ; 1 Inst. 332 b.

conveyance in fee, not operating by way of discontinuance, and dis-  
without issue inheritable to his estate-tail, the lease or estate so  
granted will, *ipso facto*, determine on the death of tenant in tail, and  
failure of his issue.

[\*315] But a common recovery duly suffered by \*tenant in tail  
will bar the remainders and reversions expectant on the  
estate-tail, and all charges and estates which are derived out of the  
estate in reversion and remainder (l). In fact it conveys the fee-  
simple (ll).

Tortious alienations by tenants for life are not usually ranked  
under the doctrine of discontinuance ; and yet a feoffment, a fine,  
or common recovery by a tenant for life, having the immediate free-  
hold, operates in the like mode, and produces the like effect as is  
produced by a discontinuance by tenant in tail ; with the difference  
only, that a discontinuance renders it necessary that the seisin should  
be restored by action (m) ; while under a disseisin, discontinuance,  
or forfeiture, by tenant for life, the seisin may be restored by  
entry, until the right of entry shall be taken away by a descent  
cast, or by a warranty, or by the statute of limitations.

Another distinction is observable between discontinuance by  
tenant in tail, and a discontinuance, disseisin, or forfeiture by  
tenant for life. Every tortious alienation by a tenant for life is a  
breach of the feudal contract, and enables the reversioneer or re-  
mainder-man to enter for a forfeiture. But no alienation by a  
tenant in tail, while full tenant in tail, and before there is a possi-  
bility of issue extinct, will, though tortious, give a right of  
[\*316] entry, or of \*action, or of claim, for a forfeiture. The  
like observation is applicable to a base fee held under the  
alienation of a tenant in tail, while there is a possibility of issue  
under the entail.

It will be useful to collect the following propositions, as affording  
material information on the powers of alienation allowed by law to  
tenants for life ; with distinctions between the effect of tortious and  
of rightful acts, proceeding from them by way of conveyance.

All alienations are rightful or wrongful. All rightful alienations  
are governed by the rule *cessante, &c.* Therefore the estate which  
passes by a rightful alienation cannot be of greater extent than the  
estate of the grantor.

Wrongful alienations are tortious, and operate by way of dis-  
seisin ; hence the distinction between tortious conveyances and in-  
nocent conveyances.

Tortious conveyances operate of necessity by way of disseisin,  
while innocent conveyances do not occasion any wrong ; and there-  
fore do not devert any estate, or disturb any seisin (n).

A tenant at will, or a tenant for years, being in possession, may  
by a feoffment give the fee to the feoffee. The fee passes by force  
of the livery of seisin ; so a lease for life, with livery of seisin by a

(l) *Capel's case*, 1 Rep. 62 a. (ll) Litt. § 596. (m) 1 Inst. 327. (n) 1 Inst. 327 b.

tenant at will, or for years, would place the freehold in the lessee ; and, as a necessary consequence, leave in the lessor, though formerly only tenant at will, or for \*years, a new rever- [\*317] sion expectant on the estate for life. So if a stranger make a lease for years, and the lessee enter, claiming to hold for years, he will become tenant for years, and the lessor will have the fee by way of disseisin, and as a reversion expectant on the terms of years (n).

In the argument of *Goodright v. Forrester* (o), this point was not correctly stated.

— If tenant for life make a grant by deed without livery, the estate which he has, and no greater estate, will pass ; and the law prefers a less estate by right to a larger estate by wrong (p).

But if tenant for life having the immediate freehold make a feoffment, levy a fine, or suffer a recovery, the alienation will be wrongful, and will divest the estate of the persons in reversion and in remainder ; since a wrongful fee-simple will be held under such feoffment, fine, or recovery (pp).

When a person is tenant for life in reversion or remainder expectant on a prior estate of freehold, his feoffment would be a disseisin, and would pass a wrongful fee-simple ; but his fine or his recovery, although it would operate as a forfeiture, would not under such circumstances disturb or divest the estate of the tenant for life in possession, or the estates of those in reversion or remainder.

\*A tenant in tail, having the immediate freehold by force [\*318] of the entail, may, as has already been shown, discontinue the estate-tail, and consequently divest the estates in reversion or remainder ; and a fine or a recovery not suffered, with proper vouchers so as to bar the issue and remainders, &c. would, *cæteris paribus*, have the like effect.

But when the freehold is conveyed by an innocent assurance no discontinuance will be effected : The utmost interest which would pass would be a mere base fee, commensurate with the ownership under the estate-tail. And a tenant in fee-simple, or of a base and determinable fee, cannot by any means, or under any circumstances, effect a discontinuance, or, as a consequence, make a wrongful alienation.

When a discontinuance is effected, or a disseisin committed, then the grantee may have a larger estate than was ever vested in the grantor. Thus, if tenant for life, or tenant in tail in possession, make a feoffment, or even a lease for the life of the lessee, so as the same be a lease not warranted by the enabling statute of Hen. VIII. the grantee will have an estate, arising in the first instance, by disseisin ; and in the second instance, by discontinuance ; and the grantor will have a new reversion expectant on this particular

(n) *Shandell v. Baugh*, Cro. Car. 302 ; *Jerritt v. Wears*, 3 Price's Rep. 535.

(o) *Goodright v. Forrester*, 1 Taunt. 678.

(p) 1 Inst. 42 a.

(pp) 1 Inst. 327 b ; Litt. § 20.

estate. But when circumstances will admit of it the law will construe an estate to be rightful rather than wrongful (g).

[\*319] \*The right or power of a tenant for life to discontinue the persons in reversion or remainder is established by numerous authorities.

That some assurances of tenant for life do, and others do not, devest, is proved by various text-books (r).

And some discontinue, viz. turn into a right of action (s).

And others by way of distinction only devest, viz. turn into a right of entry (t).

Hence the observation of Lord Coke (u), "There is a diversitie betweene an alienation working a discontinuance of an estate, which taketh away an entrie, and an alienation working, devesting, or displacing of estates, which taketh away no entry. As, if there be tenant for life, the remainder to A in tail, the remainder to B in fee, if tenant for life doth alien in fee, this doth devest and displace the remainders, but worketh no discontinuance. And therein it is to be observed, that to everie discontinuance there is necessarily a devesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason

[\*320] that such inheritances as lie in grant cannot, \*by grant, be discontinued; because such a grant devesteth no estate, but passeth onely that which he may lawfully grant, and so the estate itself doth descend, revert, or remain."

The following points of distinction and the authorities to which reference is made, will elucidate this useful head of the law.

1st, A mere grant or re-lease by a tenant for life will not pass more than he may rightfully grant; namely, his own estate, or some other estate determinable on his decease, though the grant may import to convey a fee (x).

Whenever tenant for life passes more than his life-estate, and conveys less than the fee, by livery of seisin, fine, or recovery, he gains a new reversion under the tortious alienation (y).

For tortious alienation necessarily destroys the former seisin, and the privity, &c. between the tenant for life and his reversioner and remainder-man, and carves out a new seisin under a new title.

A feoffment, fine, or recovery of tenant for life, is the only assurance which will devest as a conveyance; for a warranty by tenant for life never, by its own operation, produced the effect of devesting (z).

[\*321] \*2dly, A feoffment by a tenant for life will pass the fee-simple, viz. a greater estate than he has, even though the feoffment be by a tenant for life, who also has a remainder in tail, sub-

(g) 1 Inst. 42 a; *Preston's Essay on Estates*, ch. Life.

(r) Litt. § 415, 416; 1 Inst. 287 b. 330 b.

(s) *Finch's Description of Common Law*; *Sheppard's Abridg. Discontinuance*.

(t) 1 Inst. 327 b.

(u) *Ibid.*

(z) Litt. § 609, 610.

(y) Litt. § 620; 1 Roll. Abr. 676; *Finch's Law*, 135.

(z) 1 Inst. 251; *Chudleigh's case*, 1 Rep. 120; Litt. § 611. 415, 416.

ject to a mesne estate between the estate for life and the remainder (a).

That a fine by a tenant for life having the freehold will divest and be a discontinuance, in the sense of disseisin, of the estates in reversion and remainder, is proved by many authorities (b).

And a feoffment, or fine or recovery, by two successive tenants for life, will divest the inheritance (c).

And though one of these tenants for life had an inheritance after mesne remainders of inheritance, yet according to the ancient authorities there will be a divesting of the seisin (d).

In *Smith v. Clifford* (e), a contrary doctrine prevailed.

But a feoffment, fine or recovery, by tenant for life, and the owner of the first estate of inheritance, is a rightful conveyance (f).

\*The like observation is applicable to a common reco- [\*322] very.

But a person who has not the immediate freehold cannot, by fine or any other means than a feoffment, divest the freehold; or, as a consequence, divest the estates in reversion or remainder (g); or affect a tenant in common claiming in remainder after the estate of a prior tenant for life (h).

That the feoffment of a person in reversion or remainder, after an estate for life, will divest the seisin, flows from the nature and efficacy of the feoffment, and not from any power of alienation residing in the owner of the reversion or remainder (i).

That a feoffment, fine or recovery, divests, is a consequence of passing a fee-simple; or that it passes a particular estate under a wrongful alienation; for there cannot be two fees-simple in the same land—one excludes the other (k).

But if tenant for life enfeoff the person who is the owner of a remainder after a mesne estate of inheritance, such feoffment will divest the inheritance (l).

And if they join in a feoffment the like effect will be produced.

\*The alienation of tenant for life in order to divest, [\*323] must be to a stranger, or some one not having the next or immediate estate of freehold or inheritance (m).

If it be to the next tenant for life, or owner of the inheritance, it will be a surrender (n).

(a) 1 Inst. 251; *Bredon's case*, 1 Rep. 76; *Broke's Abrid.* Discontinuance, pl. 2.

(b) 1 Inst. 251. 328; *Focus v. Salisbury*, Hard. 400; *Whetstone v. Whetstone*, Dyer, 72 b.

(c) *Bredon's case*, 1 Rep. 76; Dyer, 323. 334; 1 Inst. 251 b.

(d) *Pelham's case*, 1 Rep. 146.

(e) 1 Term Rep. 738.

(f) 1 Inst. 302 a; *Bredon's case*, 1 Rep. 76.

(g) *Roe v. Elliott*, 1 Selwyn & B. 85.

(h) *Ibid.*

(i) *Gallant's case*, in *Focus v. Salisbury*, Hard. 400; 1 Taunt. 596; Litt. § 618; 1 Inst. 332.

(k) Litt. § 620; *Broke's Discontinuance*, pl. 64; *Hunt v. Bourne*, 2 Salk. 422.

(l) *Chadleigh's case*, 1 Rep. 140.

(m) Litt. § 625, 626.

(n) Co. Litt. 41 b. *ad finem*, 42 a. *ad primum*; 1 Co. 76 b; Co. Litt. 252 a.

When tenant for life makes a feoffment to a stranger he gives a fee without gaining it to himself. For that reason his wife is not dowerable (o).

But if tenant for years make a feoffment his wife will be dowerable (p); for his feoffee cannot allege that the feoffor was not seised in fee (q).

A quotation from *Hobart* may be added in this place, as illustrative of the general doctrine, though it would, with more propriety, have found a place in a former part of this work (r): "Of possessory things an expulsion may be made, as well as a disseisin; and therefore if a man make a lease for years of land, and a stranger put out the lessee, he doth also disseise him in the reversion; but

"if the lessor put him out, there is no disseisin committed, [\*324] "and yet the lessee hath lost his estate, and \*hath but a

"right to it, and that whether he will or no. For though it be true, that when two are in possession the possession is judged "in him that hath right, (for he only possesseth,) though the other "be in possession too, and take away the trees, corn, or the like, "yet, when the true owner is clearly put out, and removed, then he "hath no longer estate or possession, but right only, and hath no "election to be in possession or not in possession, as that case "stands, and therefore clearly he cannot now grant his term; and "if the lessor bring an action of debt for his rent due at Michaelmas, the lessee shall plead that he did enter upon him, and put "him out, and he continued his possession at the term, for he cannot have rent out of that land that he himself possesseth. And "if the lessor after such expulsion dieth, the land shall descend "in possession to the heir, and the executor shall not claim that "that was a lease, for a term never bears a *que* estate. But it is "true that there are certain cases wherein a possession cannot be "gained."

What descents take away entries.

By the rules of the common law, a descent from a disseisor to his heir places the heir in the seisin by the operation of law; and the law protected this seisin for the benefit of the heir, by taking from the rightful owner the remedy of restoring the seisin by entry. This was a punishment for his laches: and as a [\*325] \*protection and security to the heir, the seisin could not be regained without an action. To the general rule there were the exceptions which privileged infants, married women, persons of unsound mind, and persons who were absent beyond seas at the time of the descent cast, from being precluded of their right of entry by descent. Also the entry was not taken away when the disseisor claimed *by descent* under the same title as that which belongs to the disseisee (s).

(o) 1 Roll. Abr. 676.

(p) Co. Litt. Hale's note, 31b; *Moseley v. Taylor*, Sir W. Jones, 317.

(q) Broke, title Disseisor, pl. 78.

(r) Hob. Rep. 322; Sir W. Ellis v. *Taylor & Bishop*.

(s) Litt. § 396. 398.



As disseisins became frequent, an act of parliament was passed, to declare, that a descent *from a disseisor* should not take away the entry of the rightful owner; unless the disseisor had been in the seisin for five years before the descent was cast.

But this statute did not extend to any case, except of the disseisor himself, under an actual disseisin on a person actually seised; for that reason, a descent from an abator, an intruder, a discontinnee, or the alienee of a disseisor, or from the heir of the disseisor, is governed by the rules of the common law, and not by the provisions of this statute (t); therefore seisin for any time, however short, in a person thus circumstanced, with a descent to the heir, will take away the entry of the rightful owner, and drive him to his remedy by action.

In justice, however, to persons who may enter, \*but [\*326] cannot bring an action, the law has made an exception in favour of persons of this description: It follows, that a person claiming as *devisee* is not precluded from his entry, when to preclude him from his entry would be to deny him all remedy (u). For instance, if a man seised in fee devise by his will, and die seised, and the heir, or a stranger, enter by abatement, and die seised, this descent will not take away the entry of the devisee, or of his heir; for, as under these circumstances the devisee could not maintain any real action, the law preserves his right of entry; but had the devisee obtained an actual seisin, or even if the devisee had been to one for life, with remainder over, and the devisee for life had obtained an actual seisin, and then died seised, and on his death there had been an intrusion, in each of these cases, it is apprehended, the devisee might maintain a real action, grounded, in the former case, on the seisin in fact; and in the latter case, on the seisin in law, and therefore have been beyond the pale of the law which preserves the right of entry.

The like observation applies to persons having titles under chattel interests, rights of entry for conditions broken, and by escheat, &c.

It is also to be observed, that to take away an entry there must be a descent; in other words, the heir must take *as heir*; for a devise, \*or other disposition by the disseisor, will not [\*327] produce the same effect as a descent; and as often as the heir is to take under a will as devisee, and not as heir, by reason that the quantity or quality of the estate which he would have taken as heir, is changed, as in the instance of a devise to the heir in tail, or to several co-heirs as tenants in common or joint-tenants, or to the heir in fee, subject to an executory devise (x); the heir must be considered as devisee, and not as heir: and the privileges and protection afforded to an heir, taking as heir, will not belong to the heir taking as devisee or purchaser.

(t) 1 Inst. 238.

(u) 1 Inst. 111 a. 240 b; 2 Schoales & Lefroy, 104.

(x) *Scott v. Scott*, Amb. 363.

The descent must also be of an estate of inheritance either in tail or in fee ; and such estate of inheritance must confer the immediate freehold (y) ; and it must be a descent to the heir, and not a transmission to successors ; and therefore a descent, or quasi descent, to the heir as special occupant, or the transmission from a sole corporation to a successor, will not take away the entry (z).

Another exception to the general rule is, that a descent to the heir, who is the original disseisor, will not take away an entry, because no man shall take advantage of his own wrong.

In the case of a married woman being entitled, and the [\*328] descent cast while she is under \*coverture, the descent will bind the husband during his life, though it leaves the wife and her heirs at liberty to enter (a).

When an action may be brought.

For every disseisin, an action is a concurrent remedy, with an entry, when an entry may be made ; and in many cases an action may be maintained, although an entry would not be lawful.

As often as there is a discontinuance by tenant in tail, an action is the only available remedy.

At the common law, a discontinuance by a husband seised in right of his wife would have put the wife and her heirs to their remedy by action.

And whenever the entry is tolled by descent, it is a necessary consequence that the remedy by real action must be pursued.

When an entry may be lawfully made, an ejectment may be maintained, and, in most cases, without any previous entry.

In short, it is now agreed, that the only instance in which an actual entry is necessary, preparatory to an ejectment, is when a fine with proclamations has been levied, and such fine is grounded on an adverse seisin.

A fine at the common law, in other words, a fine without proclamations, does not render it necessary that there should be [\*329] an actual entry \*prior to an ejectment ; and if an ejectment can be brought after a fine has been levied, and before all the proclamations are made, the want of an actual entry will not be an objection against the right to maintain an ejectment (b).

In all cases in which an ejectment cannot be maintained, resort must be had to a real action for restoring the seisin ; and as often as there is a subsisting right, the remedy by action is a necessary consequence ; and such action must be adapted to the nature and special circumstances of the case. Under the next head, except one, there will be found a few observations applicable to the actions which are in general use at this day.

The different species are enumerated in *Booth* on Real Actions, and in *Comyns's Digest*, title Action ; but many of these actions are

(y) Litt. § 387.

(z) Litt. § 413.

(a) Litt. 403, 404.

(b) *Doe v. Williams*, Cowp. 622 ; 1 Irish Term Rep. 577.

so rare in practice that they may be passed over without notice. At the same time some of these actions, especially the *cui in vita, sur cui in vita, writs of aiel*, &c. may, on particular occasions, deserve consideration, as the means of prosecuting an action when an entry or ejectment is barred.

When a remitter shall restore the seisin.

Remitter is an act or operation of law.

It is applicable when a person has a right which is remediable, and the freehold, under \*a tortious or wrongful [\*330] seisin, is cast on him by act of law, or he becomes seised of the freehold without his default, or the person who has the freehold disclaims it (c). When there is a right of entry, as distinguished from a right of action, then there will be a remitter, when the possession, or the title to have the possession, is acquired (d). The principle of the doctrine of remitter is, that if the right and the seisin were in different persons, the person who had the right must prosecute that right against the person who has the seisin of the freehold: a man cannot sue himself: and therefore he would be without remedy, as far as respected his ancient title or better right, unless the law redressed the injury, by reviving the ancient right; and the law does, by this operation of remitter, redress the injury, by putting an end to the seisin under the tortious or wrongful ownership, and by reviving the ancient seisin under the rightful title.

A few examples will illustrate these observations.

Suppose a tenant in tail to discontinue the estate-tail, and to take back a fee to himself, this estate-tail is to be considered as the rightful estate; and it ceases by the discontinuance; and he obtains a new seisin under a new title; and his fee is a wrongful estate.

Again; suppose him to die intestate, seised of \*the fee, [\*331] leaving a son, who is his general heir at law, and also the heir to the entail. On the death of the father the wrongful estate in fee-simple will descend to the son as heir. The moment the freehold vests in him, the law, (considering that he is the rightful owner, by reason of the entail, and that he cannot sue himself, and put an end to the seisin under the estate in fee, and revive the seisin under the entail,) does, by an instantaneous operation of law, avoid the wrongful estate in fee-simple, and restore the ancient and rightful estate-tail. As a consequence, the heir in tail will be discharged from all incumbrances which affected the estate in fee, but which do not affect the estate-tail.

This is only one of many instances which might be adduced; for the learning applies to rights under estates in fee, as well as to rights under estates-tail; and it sometimes applies when the freehold is derived by conveyance, as well as when it is derived by descent or other act of law. The better course is to consider the doctrine as general, only admitting of some exceptions, and to trace the exceptions. They will be found in *Littleton's Tenures*, chap. Remitter.

(c) Litt. § 692.

(d) Litt. § 695.

It is also to be remembered, that no remitter to an estate, turned into a right of action, can take place, unless the party obtain the *immediate freehold* by way of estate; nor unless his right [\*332] gives him a title to the immediate \*freehold; nor does the learning extend to those rights which once existed, but are become irremediable; for the sole object of the law of remitter is to give to the party the seisin itself, instead of leaving in him a right to recover the seisin.

The learning, however, embraces those cases in which there is a right of entry, as well as those in which there is a right of action (d). It also extended to titles of entry, under terms for years, as well as to titles of entry under estates of freehold: for example; should a man, possessed of a term for years, be ousted by another person, the term would be in the wrong-doer, and the right or title of entry in the former proprietor; and the term could not be regained without a re-entry by the rightful owner, or by a remitter.

And while the rightful owner is out of possession he cannot grant the term, or surrender it to the rightful owner of the reversion. It is transmissible to his representatives, or it may be re-leased to the wrong-doer.

Should the wrong-doer die while he remained the termor, and appoint the rightful owner to be his executor, or one of his executors, it seems clear, on principle, that the law would instantly revert the term in the original owner, so that he would cease to hold it as executor.

Within what time a right of entry or of action must be prosecuted.

[\*333] \*The rule of the common law was, that a right never dies; in other words, it was not barred by any lapse of time; but it was a rule of the common law, that judgment for a demandant in a writ of right was, after a year and a day, a bar against all mankind.

In process of time it was found convenient, with a view to facilitate the alienation and exchange of property, and to protect titles under which there had been enjoyment for a considerable time, to enact certain limitations which should be a bar to persons having rights, or titles of entry, and who neglected to prosecute them for a period which was deemed unreasonable.

No subject is more interesting to those who are engaged in the investigation of titles, than to understand the periods which, under the statute of limitations, convert a defeasible or defective title into a rightful and positive title.

Of the several statutes, the statute of non-claim on fines, though not the first in date, is, from the universality of its enactments, the first in importance; more especially as it affords a concurrent protection with the other statutes.

In many instances, from the shortness of the period allowed for

claim against a fine, the bar may be complete under the statute of nonclaim on fines, although the fine is levied after the commencement of the period which would, in process of time, and had not the fine been interposed, have barred the right.

\*The best course will be to give in the Appendix an abstract of the material parts of the several statutes of limitation, as they apply to remedies by entry, or by action, or as they afford protection to titles depending on assurances which are either defective, erroneous, or lost.

These statutes are,

1st, 32 Hen. VIII. c. 2.

2dly, 1 Mar. stat. 2, c. 5; as to advowsons.

3dly, 21 Jas. I. c. 16.

4thly, 10 Wm. III. c. 14; as to recoveries.

5thly, 4 Ann. c. 16.

6thly, 9 Geo. III. c. 16; the *nullum tempus* act, applicable to the crown.

It will also be proper, after observing on these statutes, to notice to what extent, and in application to what cases, courts of equity have adopted rules of limitation, by analogy to the statutes of limitation.

A fine with proclamations can operate only as a bar by nonclaim, when there is an *adverse possession*. By an adverse possession must be understood an adverse title, grounded on the ouster, and, in case of freehold, on the disseisin of the rightful owner.

That a fine may operate with effect by nonclaim, an estate of freehold must be in one of the parties to the fine; otherwise the fine, and, as a consequence, the proclamations, may be avoided by a plea of *partes suis nihil habuerunt tempore finis levati*.

To illustrate the proposition, that there must \*be adverse [\*335] possession; first, suppose *A* to be tenant for years, or for life, with remainder to *B* for life, and a fine to be levied by *B*, while *A* remains in possession, and consequently without any ouster or disseisin of *A*; this fine cannot, either in its inception, or eventually, prejudice *A*, since it cannot be necessary for *A* to claim an estate of which he already has the full enjoyment.

This fine, instead of barring *A*, will become a protection to his title, as being part of the same seisin or ownership as that which was the groundwork of the fine (*e*).

It is an acknowledged rule of law, that a fine with proclamations will not bar any estate or interest, except such as is divested or discontinued before the fine is levied, or by the operation of the fine (*f*). Thus a fine levied by tenant for life in possession, and operating under the authorities already noticed, to divest the reversion and remainders, may eventually become a bar to the rights

(*e*) *Focus v. Salisbury*, Hardree's Rep. 401; *Skinner*, 300; *Carhampton v. Carhampton*, 1 Irish Term Rep. 567.

(*f*) *Prodger's case*, 9 Rep. 106 a.

of the persons in reversion or remainder, provided the discontinuance or divestment shall have taken place prior to the fine (g).

So if *A* be tenant for life, with remainder to *B* for life, with remainders over, and *B* enter, and disseise *A*, and levy a fine [\*336] with proclamations, this fine may operate by nonclaim as against *A*, and all persons in reversion or remainder.

The contrast of these cases must suppose *A* to be a continuing tenant for life, with remainder to *B* for life, with remainders over, and a fine with proclamations to be levied by *B*.

This fine, as it does not divest the estate of *A*, and as the continuance of seisin in *A* is a continuance of the seisin of all persons in reversion or remainder, will never, in any event, nor under any circumstance, bar the reversion or remainder (h).

As a person who has a base fee, that is, a fee derived out of an estate-tail, cannot discontinue the estate in remainder or reversion, it should seem that the effect of a fine levied by him (i), would, as has already been more fully discussed, cease on the determination of his estate.

It cannot have any operation as against those in reversion or remainder, because these estates are not divested; although it may operate, at least during the base fee, as against those who have adverse or conflicting titles.

In considering the bar by nonclaim on fines, it will be proper to advert briefly, and in a summary way, to the operation of the fine.

1st, As against persons who have a present right of entry or action.

[\*337] \*2dly, Against persons who have future rights of entry or of action.

3dly, Against persons who have future rights of entry or of action, but who labour under the disabilities of infancy, insanity, imprisonment, or absence beyond seas. A more detailed and connected view of the subject will be found in *Cruise on Fines*, and in the 2d vol. of *Preston's Practice of Conveyancing*.

1st, As against persons who have present rights of entry or of action.

All persons of this description, unless labouring under disabilities, are bound to make their entry, or bring their action within five years from the last proclamation of the fine; for as they have immediate rights, and may pursue immediate remedies, the statute of nonclaim has an incipient operation against them as soon as the last proclamation has been made; but it must be observed, that if the same person has different estates, different remedies, or different causes of action, he is at liberty to suffer a bar to take place against him for one estate, or one cause, without being precluded, when the proper time may arrive, from asserting his title for another

(g) *Roe v. Power*, 2 New Rep. 1; *Doe v. Williams*, Cowp. 602; 1 Irish Term Rep. 574.

(h) *Carhampton v. Carhampton*, 1 Irish Term Rep. 567; 1 Inst. 298 a. (i) 10 Rep. 96.

estate, or for another cause : for example ; if *A* be tenant for life, with remainder to *B* in tail, with remainder to *A* in fee, *A* may permit a bar by nonclaim, with respect to his life-estate, and yet a title may be asserted in respect to his estate in fee at the time appointed for the commencement of this estate in possession.

So \*when *A* is tenant for life, with remainder to *B* in fee, [\*338] and a fine is levied by *A*, and such fine either occasions a forfeiture, or is preceded by a forfeiture, the remainder-man may either elect to enter within five years for the forfeiture, or within five years after the death of *A*, in right and by reason of the remainder in fee.

Thus as to the forfeiture, the remainder-man is in the situation of a person having a present right of entry or of action ; and as to the remainder in fee, he is in the situation of a person having a future right of entry or of action.

2dly, As to persons having future rights of entry or of action.

The persons who have these rights of entry or of action, unless labouring under incapacities, must enter a claim within five years after the time at which their right of entry or of action shall be complete by the determination of the rights under the preceding estates, otherwise they will be barred.

When *A* is tenant for years, with remainder to *B* in fee, and *A* is ousted, and because the fee is, in terms or in effect, claimed, *B* is disseised ; *A* may enter immediately ; and consequently may bring his ejectment, and he will be barred by five years nonclaim.

Although *B* may immediately bring a writ of entry sur disseisin, or an assize, he cannot enter immediately, as his right to the possession will not be complete till the expiration of the term, or till the term shall be extinguished (*k*). But \*he may [\*339] make his claim, or enter at any time within five years after the expiration of the term.

So if *A* be tenant for life, with remainder to *B* for life, with remainder to *C* in tail, with remainder to *D* in tail, with remainder or reversion to *E* in fee, each of these persons in succession will have a period of five years for asserting his title ; and the five years is to be computed from the time at which the prior estate, if continuing, would have determined. Thus, *A* may enter within five years after the last proclamation ; *B* may enter within five years after the death of *A* ; *C* may enter, &c. within five years after the death of the survivor of *A* and *B* ; *D* may enter, &c. within five years after the death of the survivor of *A*, *B*, and *C*, and the failure of the issue inheritable to the estate of *C*, and so on, progressively ; and the entry of any one of these tenants, or judgment for him in an action, will restore the seisin to himself, and all persons entitled in reversion or remainder expectant on his estate.

3dly, Of the persons labouring under disabilities.

It is a general rule, that if the period of nonclaim once begins to

run, it will continue to run, notwithstanding some subsequent disability. Therefore if a fine be levied, and duly proclaimed, and *A* has a present or future right of entry, and he is free from [\*340] disabilities at any \*time after he may lawfully enter or claim the possession, the fine will continue to run against him, his heirs, executors, &c. notwithstanding he may afterwards become disabled ; and notwithstanding he may die, leaving heirs, &c. who are infants, or labouring under some disability.

But if the right first accrue to a person who is at that time under a disability, the fine will not begin to run against him till he shall be free from disability ; and successive disabilities, without any intermission, will continue to him a protection against being barred by nonclaim : but any cessation of disability will call the statute into operative force, and no subsequent disability will arrest the bar produced by the statute.

Whether the person entitled to a present right of entry, or of action, be so entitled in respect of an estate which was immediate or future at the time of the last proclamation, such person is equally within the protection of the statute, when he labours under disability at the time when his right of entry or of action accrues : for example ; if *A* be tenant for life, with remainder to *B* in tail, and a disseisin is committed by a stranger, and a fine levied, *A* must enter or claim within five years from the last proclamation, unless he be at that time under some disability ; and *B* must enter or claim within five years after the death of *A*, unless he be at that time [\*341] under some disability ; \*and each of the persons labouring under a disability must enter or claim, &c. within five years after he shall be free from such disability, or from a series of disabilities existing without any interval.

Although the ancestor may die under a disability, it is now settled, contrary to the opinion of former times, that the heir, &c. must make his claim within the period of five years (*l*) ; and it seems to be the sound and now established true construction of the statute of nonclaim on fines, that no one, except the person to whom the right *first* accrues, is within the protection afforded by the saving clause in the statute of nonclaim ; and consequently, if *A*, having a present right of entry or of action, dies while labouring under a disability, his heir, though labouring under a disability, must enter or claim within five years, or he will be barred by nonclaim on the fine.

Thus, successive owners under the *same* estate cannot protect themselves from asserting their claim on account of successive disabilities ; but every claim must be barred by the operation of the fine with proclamations, unless it shall be asserted during the life of the person to whom the right of entry or of action first accrues, or within five years from his death ; whatever may be the state of the rightful owner in respect of disabilities.

(*l*) *Dillon v. Leman*, 2 H. Blacks. 584.



\*Every entry, &c. or claim, to avoid the fine, must, under the provision of the statute of Anne (m), be prosecuted within one year, or it will be nugatory. [\*342]

Before this salutary law was passed, an entry or claim once made avoided the operation of the fine, and left the party at liberty to prosecute his title in like manner as if no fine had been levied.

In point of law, the fine was avoided, and its operation wholly and for ever defeated. Mr. Serjeant *Williams* has given an useful note on this subject.

These observations embrace that part of the learning on fines which is relevant to the point now under consideration ; but these observations form a very small portion of the learning which ought to be obtained respecting the operation of fines.

The best mode of ascertaining the effect of the other statutes of limitation will be to advert to the remedies in general use, and to consider the application of the statutes as a bar to these remedies.

1st, The action of ejectment is the more general remedy, and is always adopted when circumstances allow of it. The statute of limitations of 21 James I. and the statute of nonclaim on fines, severally give a limitation to the time within which an ejectment must be brought.

\*To maintain an ejectment there must be a right of [\*343] entry, and unless the right of entry shall have been prosecuted within twenty years, except when there are disabilities, and when there are disabilities, within ten years after the disabilities cease, the statute of 21 James I. will be a bar to the remedy, and the statute of nonclaim on fines may bar the right of entry in the short period of five years from the time at which the right accrues, except when there are disabilities, and in that case, within five years after the disabilities shall cease.

2dly, A formedon is a real action ; it is the writ of *right* of persons who are entitled under an entail, or claiming a remainder after an estate-tail. Formedons are divided into a formedon generally ; formedon in descender ; formedon in remainder, or reverter.

The first species of action is maintainable by the immediate donee in tail. The second species by the heir or issue of a donee in tail ; and the third species by a person who is entitled in remainder or reversion after an estate-tail.

The formedon seems to lie in those cases only in which the title *depends on the gift*, and the right is to be asserted by reason of the gift ; for when the donee in tail, or the issue, or a person in reversion or remainder, obtains an actual seisin, or even a seisin in law, by reason of the determination of a prior estate for life, continuing in the owner of that estate, and \*is actually [\*344] disseised, he himself may maintain an assize, or a writ of entry sur disseisin, grounded on such actual seisin, or a writ of intrusion on such seisin in law ; and the limitation to this remedy

will be thirty years ; but should this person be disseised after he has regained his seisin, and die, the issue claiming *per formam doni*, or the persons entitled in reversion or remainder, will, it is apprehended, be driven to their formedon.

The limitation to the several writs of formedon was fifty years, under the statute of Hen. VIII. and the period is now reduced to twenty years by the statute of 21 James I. c. 16, with an exception in favour of persons labouring under the disabilities of infancy, coverture, unsound mind, absence beyond seas, or imprisonment ; so that a person who must sue his formedon will be barred, unless his action shall be brought within twenty years from the time at which his right shall accrue ; or unless he shall labour under a disability ; and in that case the action must be brought within twenty years after the disability shall cease ; and when a fine with proclamations has been levied, nonclaim for five years, unless there has been a disability ; and in case of a disability, then a nonclaim for five years after the disability has ceased, will bar the remedy, although the period of twenty years limited by the statute 21 James I. shall not be complete.

[\*345] In those instances alone which concern \*limitations to the right of actual entry, and to the remedy by formedon, and nonclaim on fines, there are exceptions in favour of persons labouring under infancy, &c. In all the other instances, the only exception which was introduced is to be found in the statute of Hen. VIII. and the exception in that statute was confined to disabilities which existed at the time of passing the statute, and of course cannot be relevant at this day.

The next species of remedy is for *intrusion* on the death of a tenant for life (n), to the prejudice and disseisin of the remainderman or reversioner ; or for an abatement of the seisin of the heir whose ancestor died seised of the fee-simple.

When there is an intrusion after the death of tenant in tail, a formedon, and not a writ of intrusion, is the proper remedy ; and when there is an abatement of the seisin which descends to an heir in tail, a writ of formedon, and not a writ of entry sur abatement, must be prosecuted.

The writ of ENTRY SUR ABATEMENT must necessarily be grounded on the seisin of the ancestor ; and therefore *fifty years* is the limitation within which a writ of entry sur abatement must be brought. It does not seem to have ever been supposed that the disseisin was to the heir, so as to bar him, unless he should bring his action within thirty years.

[\*346] \*But in regard to writs of ENTRY SUR INTRUSION, thirty years, or fifty years, according to the circumstances, is understood to be the period of limitation ; but no authority has been found which can be considered to bear on this point, and render it clear.

(n) Booth on Real Actions, chap. iv.

The distinctions which present themselves, are,

1st, The writ of intrusion must be prosecuted by the persons originally disseised within thirty years ; and should thirty years run against him before he had regained his seisin, he and his heirs would be barred of all remedy. But should he die within thirty years, the right would become *ancestral*, and the heir would be allowed to maintain his writ of intrusion at any time before the expiration of fifty years from the original disseisin.

The period of limitation to a *writ of right* is generally supposed to be sixty years. But the statute makes a difference in its limitation when the disseisin is committed against the demandant himself, and when it is committed against an ancestor.

The demandant will be barred in case he was disseised, and has not brought his writ of right within thirty years ; and should thirty years elapse against the disseisee, and he should be barred, it would follow on principle that a bar to him would be a bar to all his heirs. But should the disseisee die before the thirty years are expired, the remedy of the heir would be *\*ancestral* ; and the [\*347] heir might bring his writ of right at any time within sixty years from the time of taking the *esplees*, viz. the profits in kind, or in rent, from a tenant at will, or for years.

A bar to a writ of right, or rather a judgment in a writ of right, is conclusive on all other remedies ; since this is a remedy of the highest nature, and puts the title on the footing of the mere right. But a bar to an inferior writ, or an inferior remedy, is no bar to the superior remedy by a writ of right. And whenever circumstances will admit, the claimant should try his title by every other means, before he resorts to the remedy by writ of right (e).

It must be always borne in mind, that a fine with proclamations, levied during the pendency of the limited period of sixty years, or of thirty years, may be a bar to the right, and to the remedy by writ of right, by reason of the nonclaim for five years against a person who is not protected by the savings in the statute of nonclaim. The like observation applies to all the other remedies by real action. Therefore, as often as a fine with proclamations occurs in a title which is to be protected against a claimant, or against a defect in the mode of deducing the title, the more safe, and the more easy, course, is to consider whether a bar has *\*not* been produced by the statute of nonclaim on [\*348] fines, before resort is had to the other statutes of limitation.

On the other hand, it must also be remembered, that there are saving clauses in the statute of nonclaim on fines, while there is not any saving clause relevant to modern claims in the statute 32 Hen. VIII. c. 2.

It may sometimes happen, that a fine with proclamations has been

levied, and no bar effected by force of the fine, and yet a bar may have been effected under the other statutes of limitation, even while the claimant, or person having title, was protected from the bar of the statute of nonclaim on fines. For example ; if a man should be disseised, and twenty-five years should run against him, and then he should become lunatic, or under any other disability, and a fine with proclamations should be levied by the disseisor, or person claiming under him, and afterwards five years should run while the person so entitled should labour under a disability, in these circumstances, the fine would, by reason of disability, be inoperative to bar the title, and yet a bar would be effected under the statute of Hen. VIII. ; since that statute makes no allowance for disabilities, and therefore continues to run against the person who has the right.

The like observation is applicable to all other instances which can occur under the statute of Hen. VIII.

[\*349] \*The statute of 21 James I. contains exceptions in favour of persons under disabilities. But it may happen that a person is excluded from the benefit of the exceptions in the statute of 21 James I. although under different circumstances he might have been protected by the saving clauses in the statute of nonclaim on fines : for instance ; the twenty years *may have begun* to run, and be nearly complete, and then a fine may be levied. A disability existing at that time would prevent the application of the bar by the statute of nonclaim on fines ; and yet the bar under the statute of 21 James I. would be complete at the end of the twenty years.

These observations lead to another conclusion : When there are *different rights*, and different remedies, a fine may be inefficient to bar one right or one remedy, and yet it may become efficient to bar another right or remedy.

For instance, if a man should be disseised, he may either bring his ejectment within twenty years, his writ of entry within thirty years, or his writ of right within the same period. A fine may be levied by the disseisor, and the operation of that fine may be suspended, as against the right of entry, and consequently against the ejectment, by reason of infancy, &c. and yet the fine may eventually become a bar to the remedy by assize, or by writ of entry, or by writ of right, on the ground that all disabilities have ceased, so as to allow the period of nonclaim to run.

[\*350] \*The bar against the real action may also be complete under the statute of Hen. VIII. before the bar against the ejectment or right of entry will be complete under the statute of 21 James I. For example ; should a disseisin be committed against a person who is a lunatic, an infant, &c. and he should live for thirty years or more under the same, or a successive disability, the thirty years would be a bar to the remedy by assize, writ of entry, or writ of right ; and yet by reason of the saving in the statute of

James an ejectment might be maintained; and the consequence of success in an ejectment, or even of an entry, to revest the seisin, would be to establish a title in the rightful owner.

These deductions are drawn from the language, and from the probable construction, of these statutes; and it is possible that many of these points may be questionable, and even erroneous; for it may be contended, when the right is barred by the statute of limitations of Hen. VIII. the right of entry is barred as a consequence.

It has sometimes been said, and Mr. J. *Blackstone* (*p*) has favoured that conclusion, that a possession for sixty years under an undisturbed title gives a good title against all mankind.

This is true only when a disseisin has been committed against a person who solely and alone was the absolute owner of the fee-simple; or as against several persons who were owners \*of the fee-simple, as tenants in common, joint- [\*351] tenants, or tenants by entireties.

In considering the nature of the different remedies, adapted to different circumstances, it will be obvious that there are many cases to which the period of limitation of sixty years has no application.

In all cases of particular estates, with remainders or reversions expectant on them, the right of entry, or the right of action, arises only from the period of the determination of the prior estate; and the period of computation, under the statute of limitations, begins to run from the period of the regular determination of the prior estate.

Therefore, when there is a disseisin of a person who was tenant for life, or an ouster of a tenant for years, and a disseisin of the freeholder, and there were successive estates for life, in tail or in fee, it is well ascertained that each succeeding tenant will be entitled to make his entry, or to bring his action, within twenty years from the time when his right accrues; that is, from the time at which he would have had a right to the possession in case the seisin under which he became entitled had not been disturbed.

The general principle, and the effect of the statutes of limitation, is to arrange claimants into different classes; namely, as entitled to the whole fee-simple as taken from them by disseisin, or entitled to particular estates, or to \*the reversion or re- [\*352] mainder in fee expectant on a prior particular estate.

The writ of right is in general founded on a seisin of the fee-simple; conferring the right to the immediate freehold. But it may be maintained by a person who, by himself or a joint-tenant (*q*), was seised of the freehold under one estate, and of the inheritance under another estate (*r*); but then the inheritance must, it is apprehended, have been expectant on an estate merely of freehold, and not of inheritance; and seisin of the freehold by wrong (*s*), or by a title which is defeated by a better title (*t*), will be sufficient to maintain the writ.

(*p*) See 1 Vol. of Abstracts, p. 250.

(*q*) 1 Inst. 281.

(*r*) Ibid.

(*s*) Litt. § 482.

(*t*) 1 Inst. 281 a.

The writ of entry sur abatement must also be grounded on a seisin in law of the fee ; but the writ of entry sur intrusion may be founded either on a seisin in fee, or a seisin for life, but not on a seisin in tail (u). It must also be grounded on an intrusion after the death of a person who was merely a tenant for life, and not after the death of a tenant in tail (x) ; or even of a tenant in tail after possibility of issue extinct (y).

The writ of ENTRY SUR DISSEISIN, or writ of assize, must, by the common law, be grounded on an *actual* seisin of an inheritance, either in fee or in tail, or of the actual freehold for life (z).

[\*353] \*With these different circumstances end the periods of limitation for sixty years, fifty\* years, and thirty years.

The only other period is of twenty years, and it is designed for persons who cannot maintain either a writ of right or a writ of entry.

These are,

1st, Devisees who never were seised by themselves or others, and therefore have no other remedy than by ejectment.

2dly, Persons who claim by force of the gift in tail, and therefore must bring a formedon or an ejectment.

And lastly, Persons who have merely a right of entry for a condition broken, &c. or who choose to prosecute a remedy by entry, in preference to a real action.

All rights to make an entry must be prosecuted within twenty years after the right of entry accrues, unless there be disabilities, and then within ten years after the disabilities shall cease. Thus persons who have a present right of entry must enter within twenty years, unless labouring under some disability, and then within ten years after the disability shall cease ; and persons who have future rights of entry, must enter within twenty years after these rights shall be complete, unless they can claim the protection and benefit of the saving in the statute of limitations, and then within ten years after they shall be free from disabilities.

[\*354] \*But it is to be observed, that though more than ten years shall have run after the disabilities shall have ceased, there will not be any bar until the original twenty years are also complete ; and it is always to be remembered, that the period of limitation may be restricted and brought into a narrower compass by the operation of a fine with proclamations, and the statutes of nonclaim on fines. As the statutes of limitation operate in the mode of barring the remedy, a bar to an ejectment will not necessarily be a bar to a writ of entry, or the like remedy.

To consider the several divisions under which this head has been classed.

FIRST, Devisees, as such, and by force of the gift, have no other remedy than by entry. For want of seisin they cannot prosecute

(u) Booth on Real Actions, chap. iv.

(z) F. N. B. 509 ; 8 Rep. 172 b ; Booth on Real Actions, 185.

(y) *Bowle's case*, 11 Rep. 80.

(z) Booth, 177. 210. 263.

\* In some books misprinted, *forty*.

a real action (a). This observation must be confined to devisees, *quasi* devisees ; for after they have obtained a seisin, they are, as already noticed, in the same predicament with other persons who have been in the seisin ; and may maintain a writ of right, a writ of entry, or the like action, in the same manner as if they had been feoffees, grantees, &c. and seisin had been delivered to them, or those connected with them in privity.

Thus, when a gift is made *by will* to one for life, with remainders over, the seisin of the tenant for life is a seisin to those in remainder, to enable them to maintain a writ of entry, &c.

\*The only other class of persons who may enter, but [\*355] cannot bring an action, are,

1st, Persons who have a right or title of entry for a condition broken :

2dly, Persons who have a right or title of entry under particular statutes ; as the statutes of *mortmain*, &c. ; and,

3dly, Persons who have a right or title of entry by reason of a chattel interest ; as, till debts shall be paid, or to levy the arrears of an annuity, as in *Jemmott v. Cooley* (b), or by reason of a term converted into a right of entry.

SECONDLY, A donee in tail by will, after he has obtained a seisin by himself, or by the owner of a particular estate, may, in the former case, maintain a writ of entry ; and in the latter case, maintain a *formedon*. In the mean time, an entry, or an *ejectment*, which presupposes a right of entry, is the only available remedy.

THIRDLY, Persons of this class are, in effect, already considered.

In general a real action may be maintained whenever an *ejectment* will lie. The exceptions, or the greater part of them, have already been noticed. The converse of the rule, however, is not true. Sometimes, as in the case of a discontinuance, the rightful owner may have a remedy by *formedon*, although he is precluded by the effect of the discontinuance from the remedy by *ejectment*. In other cases, as when there is a descent which has tolled the entry, \*a man may be barred of his remedy by entry, [\*356] and consequently of *ejectment*, and yet be at liberty to prosecute a real action ; for although the remedy by *ejectment* is barred by the statute of limitations, by reason that twenty years have elapsed, &c. none of the statutes of limitation may have barred the remedy by real action : for example ; a man is disseised, and twenty years have run ; the twenty years are a bar to his *ejectment* ; but a writ of entry *sur disseisin*, or a writ of right, will lie for him within thirty years.

Again ; *A* dies seised, leaving *B* his heir at law ; and *B* is disseised by the abatement of *C* ; and twenty years elapse ; *B* is driven to his writ of entry *sur abatement* ; inasmuch as he is barred of his remedy by entry or *ejectment*.

The like observation applies to an intrusion : and when the disseisee dies before he is totally barred by the statute of limitations, then, as sixty years are the limited period for barring the right under

(a) 1 Inst. 111 ; 2 Schoales & Lefroy, 104.

(b) Raym. Rep. 135 ; 1 Lev. 170.

the seisin of the ancestor ; and as fifty years are the period for barring the remedy sur abatement, or sur intrusion, the heir who may be barred of the remedy by ejectment or entry will necessarily be driven to the writ of right, or to the writ of entry sur abatement, or to the writ of entry sur intrusion, or to the writ of entry sur disseisin ; as one or the other writ shall be adapted to his case, so as to enable him to avoid the bar of the statutes of limitation.

[\*357] \*A few general observations may be offered, and they will be equally relevant to the several statutes of limitation.

1st, Although joint-tenants and coparceners have a seisin *per my et per tout*, yet it is agreed, that when there is a disseisin of both, one of them may be barred by the statute of limitations, although the statute shall not have effect as a bar to the other of them (c).

From the nature of things, however, this can happen only in cases falling within the exceptions of the statutes of nonclaim on fines, and the statute of 21 James I.

As between strangers, and one of several joint-tenants, &c. the continuance of seisin in one joint-tenant, or tenant in common, or coparcener, is a continuance of the seisin in all.

But one joint-tenant, tenant in common, or coparcener, may, by an actual ouster, exclude his companion from the seisin, and gain a title by nonclaim on a fine, or by the statute of limitations ; and by an actual ouster, which may now be understood any act which denies the title of the co-tenant, may disseise his companion, so that the statute of limitations may begin to run (d).

2dly, The statutes never run against a man while he continues in the seisin ; and therefore a man must be ousted of his term, [\*358] or disseised \*of his freehold, before the statute of limitations will have any operation against him.

In modern phraseology this is called *adverse possession* ; and by adverse possession must be understood, as far as respects estates of freehold, a seisin under a wrongful estate.

In what cases, and to what extent, courts of equity admit the application of the analogy of the statutes of limitation.

The first and most prominent rule is, that nonclaim on a fine by a mortgagor, or by a mortgagee, will not bar the other of these parties (*ibid*).

3dly, A fine by a trustee will not bar his *cestui que trust* ; and a fine of *cestui que trust*, while he holds as such, will not bar his trustee.

But as between a mortgagor and a mortgagee, the equity of redemption of the mortgagor may be barred by the lapse of twenty years ; and in case of disabilities, then of ten years after the disabilities cease, without any recognition of his title to redeem.

The cases on this point, with their qualifications and exceptions, are stated in *Powell on Mortgages* (e).

(c) *Roe v. Rowston*, 2 Taunt. 441.

(dd) *Powell on Mortgages*, 219. 282.

(e) 406 ; *Hoole v. Healy*, 1 Ves. & Beames, 540.

(d) *Supra*.



The rule is adopted in analogy to the time allowed for prosecuting a right of entry under the statute of 21 James I. c.

16 (f).

\*In *Clay v. Smith* (g), Lord Keeper *Henley* observed; [\*359]

"1st, What is the length of time to bar a bill of review ?

"2dly, From what period the time is to be computed ?

"To the first : twenty years is the proper period. *Edwards v. Carrol* settled this point.

"Nothing can demand the assistance of the court but conscience and reasonable diligence ; *laches* and neglect are discountenanced here ; and therefore it was necessary to introduce a limitation.

"Lord *North* says right, viz. that there is no settled limitation to a bill of review ; yet after twenty years I will not reverse, but for very apparent error. As the court had not legislative power, the court could not limit the time ; but as soon as the parliament had limited the time of bringing actions at law, courts of equity adopted the rule, and applied the parliamentary rule to equitable cases. Twenty years is fixed by 10 William III. to bring error of fine or recovery."

In *Davie v. Beardsham* (h), the defendant could not obtain relief, as devisee of copyhold lands, which had descended to the customary heir, subject to a trust created by the will, because twenty years adverse title, not merely possession, (for the devisee had held the possession as tenant,) had run as between the heir

\*and the devisee, though the heir was constructively a [\*360] trustee for the devisee.

In this case *Davie* agreed for the purchase of certain copyhold lands, which were surrendered out of court to his use. Before admittance he died, having copyholds, and having made his will after the said contract, and thereby devised to the plaintiff (who was then, and at his death, his heir) all his copyholds ; after his death, his wife being *præmorsæ* *enascint* at his death, was delivered of the defendant's wife, who then became the heir of the devisor.

The plaintiff taking it for granted that the copyholds so contracted for did not pass by the will, suffered the heir to be admitted, and held the same of the heir for twenty years, and paid her rent for that time.

Afterwards the plaintiff exhibited his bill to have those copyhold lands decreed to him. And it was, on the hearing, declared by the court that it was clear the said copyholds so agreed for did pass by the will to the plaintiff, for that the purchaser had an equity to recover the land ; and the vendor stood trusted for the purchaser, and as he should appoint, till a conveyance executed. It was ruled, that if upon articles for a purchase, the purchaser dieth, and deviseth the land before the conveyance executed, the land passeth

(f) 1 Ves. & Beames, 539.  
(h) 1 Ch. C. 59.

(g) Ambl. 647 ; 3 Bro. C. C. 640.

in equity; but inasmuch as the plaintiff had admitted the title to be in the heir, and paid her rent, and agreed so to do, the [\*361] court should not decree it, but \*declared, if the plaintiff *had come in time*, it was proper to be decreed.

Thus twenty years was a bar to the equity of the devisee.

In *Earl Cholmondeley and Damer v. Lord Clinton*, (i), his honour, the late Master of the Rolls, on that head of argument for Lord Clinton, which relied on the possession of himself and his father for twenty years and upward, as owners, subject to an existing mortgage, observed,

"It seems to me that there is no room in this case for the operation of the statute of limitations.

"There is a possession of twenty years; but *not in the character of owner of the legal estate*, nor under any claim of being so entitled. The subsistence of the mortgage has been all along recognised, and nothing but the equity of redemption was ever claimed by Lord Clinton. Even at law, it is not mere possession that is sufficient to bar the claim of the true owner. There must be something tantamount to a disseisin. Now though there may be what is deemed a seisin of an equitable estate, there can be no disseisin of it; first, because the disseisin must be of the entire estate, and not of a limited and partial interest in it; the equitable ownership cannot possibly be the subject of disseisin; and secondly, because a tortious act can never be the foundation of an equitable title.

[\*362] "In the case of *Hopkins v. Hopkins* (l) Lord Hardwicke, speaking of the analogy between uses and trusts, says, "it is very true this would not have been endured if courts of equity had not in general allowed these trust-estates to have the same consideration in point of policy with legal estates, and given the same power to *cestui que* trusts with respect to alienations as if it was an use executed. Therefore a tenant in tail of a trust may bar his issue by a fine; a tenant in tail of a trust, remainder over, may dock the remainder by a common recovery; nay, some go so far as to say he may do it by feoffment only. But all these are common assurances, and rightful methods of conveying estates; for it was never allowed that in trust-estates a like estate may be gained by wrong, as there might be of a legal estate; therefore, on a trust in equity no estate can be gained by disseisin, abatement, or intrusion. It is true it may happen so upon a trustee, and in consequence the *cestui que* trust may be affected, but that is on account of binding the legal estate; but on a bare trust no estate can be gained by disseisin, abatement, or intrusion, while the trust continues."

"If George Earl of Orford had died seised of the legal fee, the late Lord Clinton, who entered on his death, would have gained an estate by abatement, which could only be

\*defeated, in the first instance, by entry; and after a descent cast, by action. And after twenty years continuance of the possession no ejectment could have been maintained. [\*363]

“But equity does not acknowledge that Lord *Clinton* by entering without title gained any equitable interest in the estate, and the legal interest he does not profess to have acquired. An equitable title may, undoubtedly, be barred by length of time, but it cannot be shifted or transferred. What was once my equity, may, by my *laches*, be wholly extinguished; but it cannot, without my act, become the equity of another person. It does not therefore follow that an equity can be acquired by length of possession, because by length of possession it may be barred. Here it is admitted that the equity of redemption subsists; and so long as it subsists the question to whom it belongs must remain open. Somebody is entitled to redeem, and to have a conveyance of the legal estate. To whom is the court to direct the conveyance to be made? to him who shows a title? or to him who has nothing to show but a possession of twenty years? If to the latter, then a twenty years possession must constitute, not merely a bar, but a positive title to an equitable estate. Lord *Hardwicke's* position would no longer be true, for disseisin, abatement, or intrusion, would be available modes of acquiring equitable estates.

“It will not be disputed that an equity of redemption is an equitable right, for it is only \*in equity that after forfeiture it has an existence; and although the equitable ownership be in the mortgagor, yet his possession is of a more precarious nature than that of any other *cestui que trust*. In general a trustee is not allowed to deprive his *cestui que trust* of the possession; but a mortgagee may assume the possession whenever he pleases; and therefore a mortgagor is called tenant at will to the mortgagee, and, in point of possession, he is so even in equity; for a court of equity never interferes to prevent the mortgagee from assuming the possession. It cannot be said, therefore, that Lord *Clinton*, who acknowledged the title of the mortgagee, has had any other than a precarious and permissive possession, which would be insufficient for the acquisition of a right, even supposing that by any possession an equitable right could be acquired. By the civil law, prescription can only run in favour of him “*qui, neque vi, neque clam, neque precario, possidet.*” A permissive possession, however long it might, in point of fact, have endured, could never ripen into a title against any body, for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended.

“Lord *Hardwicke* somewhere says, that a *cestui que trust* may disseise his trustee, and gain the legal estate. Doubtless the legal estate may be gained by disseisin. The *cestui que trust* may have a substantive independent \*possession, but a [\*365] mortgagor never can disseise his mortgagee; \*why? be-

\* This proposition is too general. A feoffment would be a legal disseisin.

cause his possession is not properly his own, but that of the mortgagee. In *Harmood v. Oglander* (n), it was considered as doubtful whether the trust continued to subsist, or whether the long possession had not disseised the trustee himself; but it was conceived by Lord *Alvanley*, first, and afterwards by the present Lord Chancellor, that if it subsisted, and if the trustee could recover as having the legal estate, it would follow, that the right of one of the *cestui que* trusts could not be barred by the length of time during which he had been out of possession. On that principle, Lord *Macclesfield*, in the case of *Lawley v. Lawley* (o), over-ruled the plea of the statute of limitations, on the ground that the legal estate was in trustees.

"There, in a marriage settlement, one of the trusts was, if the wife survived, to pay to her the rents and profits of certain lands, as the same were at that time let. The husband during his life greatly increased the rents of the estate; and upon his death the wife enjoyed the whole of the rents, making no distinction between the original and the additional rent. About fourteen years after her death the heir at law filed a bill for the purpose of recovering the surplus rents. The statute of limitations was pleaded, and on the ground I have stated, that the estate was in [\*366] \*trustees; Lord *Macclesfield* disallowed the plea. Now it is perfectly clear, that under any other circumstances the demand for those rents would have been barred; but it was conceived, that so long as the trust subsisted, so long it was impossible that the *cestui que* trust could be barred. The *cestui que* trust could only be barred by barring and excluding the estate of the trustee. In the present case the trust subsists. The mortgagee is trustee of the legal estate for the person who has the equity of redemption. And I am of opinion that the person who has the equity of redemption is the plaintiff, Mrs. *Damer*, as the devisee of Horace Earl of *Orford*. For as there could be no dissein of an equitable estate, there was nothing to prevent him from devising this interest; and the general words of his will are sufficient to include it."

Against that judgment there was an appeal. The case, after many intermediate discussions, was finally decided in the house of lords, on the ground that time was a bar to the remedy.

And unless the analogy be applicable, as between two persons having conflicting rights in equity, respecting the equitable ownership, the operation of the rule would be very limited.

And in *Llewellyn v. Mackworth* (p), the defendant's counsel insisted that the plaintiff was barred by the statute of limitations. [\*367] In answer, it was said, that this is a trust which the plaintiff claims, and therefore the statute of limitations did not extend to this case. But Lord *Hardwicke's* opinion was, that that was not a sufficient answer, for that rule only holds *between cestui que* trust and trustee; but does not extend to the case of a stranger,

(n) 6 Ves. 199; 8 Ves. 106.

(o) 9 Mod. 32.

(p) Barn. Ch. Cas. 449.

for a stranger is equally obliged to claim the benefit of a trust within the time appointed by the statute, in case of a trust estate, as if it had been a legal estate.

There is, he added, hardly any ancient family but there are long terms in the hands of trustees; and if strangers might be allowed to lay claim to them after any length of time it might be greatly inconvenient; and as it is a stranger that claims the benefit of this trust in the present case, the length of time must be a bar.

In *Llewellyn v. Mackworth* the legal estate was in a trustee, and the contest was between several persons claiming the benefit of the trust; but the trustee was not, as far as can be collected from the report, a party to the cause.

So in *Basket v. Pierce* (q), the Lord Keeper was of opinion, that the fine of a *cestui que* trust in tail, and nonclaim, would bar the equitable remainder-man in tail; for equitable rights are as well to be bound by fine as actions and titles at law: and though he suffered the plaintiff to bring an action in the name of his trustee, he declared his opinion to be, that the plaintiff was barred. This doctrine is becoming more general, and more readily adopted.

\*A difference is taken between a trust which charges [\*368] the person, and a trust which charges the land.

The latter may, the former cannot, be barred.

In *Hopkins v. Hopkins* (r) the language of Lord Hardwicke was, "it was never allowed, that in trust-estates a like estate may be gained by wrong, as there might be of a legal estate; therefore, on a trust in equity no estate can be gained by disseisin, abatement, or intrusion. It is true it may happen so upon a trustee, and in consequence the *cestui que* trust may be affected, but that is on account of binding the legal estate; but on a bare trust no estate can be gained by disseisin, abatement, or intrusion, while the trust continues." But *Llewellyn v. Mackworth* was in 1742, and consequently of a subsequent date, and is to be considered as a correction, or at least an explanation, of the doctrine in *Hopkins v. Hopkins*.

In *Bond v. Hopkins* (s), Lord Redesdale's language was, "the statute of limitations does not apply in terms to proceedings in courts of equity; it applies to particular actions at common law, and limits the time within which they shall be brought according to the nature of these actions; but it does not say there shall be no recovery in any other mode of proceeding. The first part of the preamble applies to particular writs; the second part to quiet possessions, \*and the enactment proceeds on the first [\*369] only. At the time of passing that act in this country, [Ireland] suits in equity were very common; and the manner in which courts of equity had considered the statute of limitations in England was well understood. Therefore this act must be considered as having passed with full knowledge on the part of the legislature of the construction put upon a similar statute in England, in

(q) 1 Vern. 226.

(r) 1 Atk. 591.

(s) 2 Schoales & Lefroy, 428.

proceedings in courts of equity ; and that courts of equity would not probably be considered as affected by it, otherwise than as courts had been considered as affected by the English act, that is, it would be considered as affecting equitable titles, and equitable titles by analogy to it.

“There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles ; courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles ; but the principles are as fixed and certain as the principles on which the courts of common law proceed.

“Nothing is better established in courts of equity, (and it was established long before this act) than that where a title [\*370] exists at law, and \*in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity ; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity. Both these cases are considered by courts of equity as affected by the statute of limitations ; that is, if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such *laches* in prosecuting his equitable title, as would bar him if his title were solely at law, he shall be barred in equity ; but that is all the operation this statute has or ought to have on proceedings in equity ; and the statute having been made in this country, after these principles had been fully established by the decisions of the courts of equity in England, on the statute of limitations made in that country, it must have been the intent of the legislature here to leave it open to courts of equity, guided by their established principles, to determine how far the statute should be applied to their proceedings. If a court of equity goes beyond the line which it ought to adopt as its limit, there is a court of last resort which may correct its errors : if that [\*371] court should act so as to alter, instead of declaring \*the law, the legislature may interfere ; but if the court of last resort decides, and the legislature acquiesces, the law must be taken to be according to the decision.”

And in *Meldicot v. O'Donel* (t), Lord *Manners* said, “Can the court give relief to a person sleeping on his rights for twenty-seven years ? Can this court listen to the case, and interpose its relief ? I think it utterly impossible. The court will stand neuter ; and say, length of time and acquiescence have deprived you of relief. “It has been suggested,” he added, “that I lay too much stress upon length of time ; and I attach more credit to it, than Lord

(t) 1 Ball & Beatty, 156.

“*Redesdale*, or any of my predecessors have done. I confess I think the statute of limitations is founded upon the soundest principle and the wisest policy; and that this court, for the peace of families, and to quiet titles, is bound to adopt it in cases where the equitable and legal title so far correspond, that the only difference between them is that the one may be enforced in this court, and the other in a court of law.”

And his lordship, after noticing the observations of Lord Camden in *Smith v. Clay* (u), observed, “now, I think that Lord Camden has put it, that he will consider an equitable right barred in the same manner as a legal title would be in a *possessory* action at law.”

\*“And in cases of fraud, where the facts constituting the [\*372] fraud are known, where there is no subsisting trust or continuing influence, the same principle will apply (uu). In the case of *Hovenden v. Lord Annesley* (x), decided by Lord *Redesdale*, and in the cases there referred to, this principle is laid down, that if the equitable title is not acted upon in the same time the legal title should, it is barred. And in *Bond v. Hopkins* (y) Lord *Redesdale* lays down the same doctrine. And I would refer also to the case of *Bonny v. Ridgard* (z), cited *Andrew v. Shrigley* (a), *Townshend v. Townshend* (b), where the same principle is recognised and acted upon (c).

“I think then I stand well supported by principle and authority, in saying that this court is bound to regulate its proceedings by analogy, or in obedience, to the statute of limitations.”

Also in *Burke v. Crosbie* (d), Lord *Manners* observed, “it is admitted that length of time may be a bar to an equitable title; and that a married woman is bound by a decree to which she and her husband were parties.”

He proceeded in another part of the judgment (e) to observe, a “court of equity is not to impeach a transaction on the ground of \*fraud, where the fact of the alleged fraud was [\*373] within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down, that every new right of action in equity that accrues to the party, whatever it may be, must be *acted upon at the utmost within twenty years*. Thus, in the case of redemption of a mortgage, if the mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment. But if not pursued within twenty years, it is like the case at law of a promise of payment beyond the six years, and *non assumpsit infra sex annos* pleaded; and so in every case of equitable title (not being the case of a trustee whose possession is consistent with the title of the claimant), it

(u) 3 Bro. C. C. 639. (uu) 1 Schoales & Lefroy, 414. (x) 2 Schoales & Lefroy, 607.

(y) 1 Schoales & Lefroy, 428.

(z) 4 Bro. C. C. 138.

(a) 4 Bro. C. C. 125.

(b) 1 Bro. C. C. 559.

(c) See *Beckford v. Wade*, 17 Ves. jun. 57.

(d) 1 Ball & Beatty, 503,

(e) p. 636.

must be pursued within twenty years after the title accrues. This was so considered by Lord Camden, in *Smith v. Clay*, referring to *Jenner v. Tracy* (f), that the same length of time should bar a redemption that would bar any other equity. In *Floyer v. Lovington* (g), it is laid down by Sir Joseph Jekyll, that as the statute of limitations had, in the case of lands after twenty years possession, barred the plaintiff of his entry or ejectment, so the court of equity, in limitation of that law, would not allow the mortgagor to redeem the

[\*374] \*mortgage after the mortgagee had been twenty years in possession. It seems to me, therefore, that the statute of limitations would of itself be a complete bar to the relief sought on this bill, as it is impossible that any new right of action could have accrued since 1735."

In *Hovenden v. Lord Annesley* (h), Lord Redesdale said, "I have looked at a great number of cases (i) for the purpose of seeing how far this rule has been adopted at different times; and I think it is impossible not to see that courts of equity have constantly guided themselves by this principle, that wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation."

The law of courts of equity on this subject is not become so precise as to admit of clear and definite rules, or of a statement of deductions by way of rule.

Expressions of eminent judges in courts of equity will show the progress which has been made towards a settled rule; and for that reason more ample extracts have been and will be given on this head than are consistent with the general plan of this work.

From the cases it will be collected that the courts of equity have to apply the analogy,

[\*375] \*1st, Between trustee and his *cestui que trust* :

2dly, Between mortgagor and mortgagee :

3dly, Between the mortgagor or trustee on the one part; and on the other part, a person who claims adversely in opposition to the title under which the mortgage was made, or the trust created :

4thly, When all parties admit the title of the mortgagee or trustee; but there are different claimants of the equity of redemption, or of the benefit of the trust under conflicting titles, and one of them has an adverse possession.

And courts of equity have to consider the exceptions arising first from fraud; secondly, from implied trust; and thirdly, from the disabilities of infancy, coverture, &c.

1st, As between a mere trustee and his *cestui que trust*, the trustee cannot set up his possession as adverse to that of his *cestui que trust*. The possession is consistent, and not adverse.

Equity will in this case interpose against any attempt of the trustee to protect himself from the performance of the trust.

Thus, in *Hovenden v. Lord Annesley* (k), Lord Redesdale ob-

(f) 3 P. Wms. 287, note B.  
(i) See Cases in page 382.

(g) 1 P. Wms. 270. (h) 2 Schoales & Lefroy, 607.  
(k) 2 Schoales & Lefroy, 607.



served, that if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is, that he does not perform his trust, his \*possession operates nothing as a bar, because [\*376] his possession is according to his title. This, it is to be remembered, is the language of a judge in a court of equity, defining the rights between a trustee and his *cestui que trust*.

And in his Treatise on Pleadings (k) Lord Redesdale has observed,

“Wherever a person comes in by a title opposite to the title to a trust-estate, or comes in under the title to the trust-estate, for a valuable consideration, without fraud, or notice of fraud, or of the trust, a fine and nonclaim may be set up as a bar to the claim of a trust. When a fine and nonclaim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver, that at the time the fine was levied the seller of the estate, being seised, or pretending to be seised, conveyed; but it is necessary to aver that the seller was actually seised. It is not indeed requisite to aver that the seller was seised in fee; an averment that he was seised *ut de libero tenemento*, and being so seised a fine was levied, will be sufficient.

“But the rule applies only to trustees under declared trusts. When a person becomes a trustee constructively, then the analogy of the statute may be applied (l). *Davie v. Beardsham* is a practical application of this doctrine. And \*Lord Manners [\*377] observed (ll), “That in cases of trusts, and of constructive fraud, equity will regulate its decisions by analogy to the statute of limitations, although it be not bound by it.”

And it seems that a fine may bar a *cestui que trust* claiming under a conflicting trust, in opposition to another *cestui que trust* (m) who levies the fine.

Thus in *Penwill v. Luscomb* (n) the language of Sir Joseph Jekyll was, “The statute of fines bars him who has a legal title if he does not enter within five years; and him who has an equitable title, if he does not bring his bill within five years, which amounts to an entry.”

And a *cestui que trust* may, by feoffment or adverse entry, divest the estate of his trustee; and may, by a fine with proclamations directed to that object, bar the trustee by nonclaim. This was admitted by Lord Hardwicke (o).

Even the title under an attendant term of years may be barred by the *cestui que trust*, when there is clear and distinct evidence that he claimed to hold adversely, and in opposition to the trustee (p).

And a trust, arising by implication or construction of law, is confessedly a case in which time may run adversely be-

(k) Mitford, pl. 203; 2 Freeman, 21.

(l) 2 Schoules and Lefroy, 636.

(ll) Ball and Beatty, 119.

(m) *Basket v. Pierce*, 1 Vern. 226.

(n) *Moseley*, 72.

(o) 1 Atk. 591.

(p) *Freeman v. Barnes*, 1 Vent. 55.

tween the trustee and *cestui que trust*, so as to bar the *cestui que trust*.

[\*378] \*2dly, As between mortgagor and mortgagee, while that relation continues, and is acknowledged, lapse of time will not be a bar ; but from the time the mortgagor or mortgagee begins to hold as owner, then the analogy applies. The mortgagor is bound to pursue his right to redemption within the limited period ; and the mortgagee may, subject to the relief afforded by equity, lose his estate in like manner as any other legal owner may lose his legal title, by the bar of the statute of limitation.

The relative situation of the parties, however, calls, even at law, for more strict and complete evidence of ouster, disseisin, &c. ; and it rarely happens that a mortgagee is barred by fine, since the evidence of his title is preserved by the payment of interest, &c. (p).

The exclusion of the title of a mortgagee is more generally referred to the presumption of payment of the mortgage-money, and a re-conveyance of the legal estate.

3dly, In a case of this description the title is merely legal, and the parties must stand or fall by their legal rights (q). Hence the observation of Lord *Alvanley* in *Harwood v. Oglander* (r), " If the parties are entitled at law they must prevail."

The trustee, on behalf of the *cestui que trust*, or the [\*379] *cestui que trust* in the name of the \*trustee, must assert the title ; and equity, except in cases of fraud, or of constructive trusts for the benefit of infants, &c. cannot interpose in behalf of the *cestui que trust* ; on the other hand, the person who obtains possession in opposition to the title of the trustee, or mortgagee, as having the legal estate, has no right to relief in equity to restrain the trustee or mortgagee, or the *cestui que trust*, or the mortgagor, from using and availing himself of any legal remedy by which the legal title may be re-established. This is the scope and substance of the observations in *Harwood v. Oglander*.

In cases of this sort, the bar, if any, must originate from non-claim on the legal operation of a fine, or the right and the power of pleading with success some other statute of limitation.

It is a subject over which equity has not any direct jurisdiction. The question, if it arise in a court of equity, must be incidentally. It may arise on a question of right to decree specific performance of a contract ; or the right to an account in respect of a rent, &c. In a late case, a court of equity compelled a purchaser to accept a title bottomed on the operation of the statute of nonclaim on fines, on evidence showing who was the heir to be barred, and that he was free from disabilities.

In cases thus circumstanced the bar of the trustee is a [\*380] bar of the *cestui que trust* ; and the \*title is wholly legal,

(p) *Fermor's case*, 5 Rep. 77.

(q) 2 Scholes & Lefroy, 70. 626.

(r) 6 Ves. 415.

and must be sued on the footing of the right to the legal estate, as between the trustee and the disseisor, &c.

And it was observed by Lord *Manners* (r), that the opinion of Sir *Joseph Jekyll*, in *Lechmere v. Lord Carlisle*, ("That the forbearance of trustees in not doing what it was their office to have done shall in no sort prejudice the *cestui que trusts*,") if it could apply, which he did not conceive it was intended to do, such a case as this before the court has been often denied, and it is contrary to many decisions. And he continued to observe, "If the trustees who are so appointed neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the statute of limitations is a bar to the *cestui que trusts*. I do not, however, decide this case upon that point; for here the plaintiff, by his bill, calls on a party specifically to execute an agreement under such circumstances, and after such a length of time, that his title cannot be sustained here upon any principle against those who have got the legal interest, accompanied by so long a possession.

In another case (s), Lord *Redesdale's* judgment was delivered in these terms: "It is said that courts of equity are not within the statute of limitations. This is true in one respect; they \*are not within the words of the statutes, because the [\*381] words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by *analogy* to the statutes. They act in *obedience* thereto. The statute of limitations, applying itself to certain legal remedies, for recovering the *possession* of lands, for recovering of debts, &c. equity, which in all cases follows the law, *acts on legal titles and legal demands*, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies; nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.

"The true jurisdiction of courts of equity in such cases is to carry into execution the principles of law, where the modes of remedy afforded by courts of law are not adequate to the purposes of justice to supply a defect in the remedies afforded by courts of law. The law has appointed certain simple modes of proceeding, which are adapted to a great variety of cases; but there are cases, under peculiar circumstances and qualifications, to which, though the law gives the right, these modes of proceeding do not apply. I do not mean to say, that in the exercise of this jurisdiction courts of equity may not in some instances have gone too far, though they have been \*generally more strict in modern [\*382] times. So courts of law, fancying that they had the means of administering full relief, have sometimes proceeded in cases which were formerly left to courts of equity; and at one period this also seems to have been carried too far.

(r) Ball & Beatty, 68.

(s) *Hovenden v. Annexley*, 2 Schoales & Lefroy, 630.

"I think, therefore, courts of equity are bound to yield obedience to the statute of limitations *upon all legal titles and legal demands*, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law; and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity;" and he cited and commented on the several cases in the note (s).

In all cases in which the application to equity is to remove the impediment to the trial of the title at law, as in the instance of an outstanding term, the limitation of time must depend on the rules of law, and not of equity; and the statute must be pleaded at law, and not in equity.

[\*383] \*4thly, On this point there are the conflicting opinions of Sir William Grant against the bar by time, and of Lord Hardwicke, and other judges, for the bar by time. Lord Hardwicke held, that the rule against the bar is confined to the cases of a trustee, and *cestui que trust* (t). Sir Thomas Plumer's judgment in *Cholmondeley v. Clinton* was in direct opposition to that of Sir William Grant in the same case, on this very point (u), and that opinion was on this point affirmed in the lords.

If in *Cholmondeley v. Clinton* (s) the mortgagee had been in the receipt of the rents; instead of the receipt of the interest, then, in conformity with all sound principle, the equity of redemption would have belonged to Mrs. Damer; supposing the other questions to be in her favour; since, under these circumstances, the possession of the mortgagee would, in the contemplation of a court of equity, have been the possession of the person really entitled to the equity of redemption; and even an admission by the mortgagee, that one of two claimants was the owner, would not have prejudiced the person in whom the title really resided.

Suppose a person who had made a mortgage in fee of his estate were to devise it by a will not duly attested, and the devisee were to enter, and continue in possession of the estate, would not five years nonclaim, on a fine with proclamations levied by him, bar the heir of mortgagor? It should seem that it would.

[\*384] Indeed the very point appears in 2 Freeman, 18 (y), in a note made in reporting *Salisbury v. Baggott*; for it is there said, "It was held, that an equity of redemption would be barred by a fine, if no claim were made in five years, and that an entry on the land would not serve, because the entry is not lawful; but the party must bring his subpoena, or else he will be barred."

(s) *Smith v. Clay*, Amb. 645; 5 Bro. C. C. 639; Hollingsworth, 1 P. W. 742; *Lockey v. Lockey*, Proc. in Chancery, 518; *Weston v. Cartwright*, Sel. Cas. in Ch. 34; *South Sea Company v. Wymondsell*, 3 P. W. 143; *Bicknell v. Gough*, 3 Atk. 538.

(t) *Supra*, 368.

(u) 2 Jacob & Walker, 1.

(x) 2 Mexivale, 357.

(y) Now reported, 2 Swans. 608, 610.

Sir *Joseph Jekyll* seems to have adverted to the same point in *Pen-vill v. Luscomb* (u).

An equity may arise out of fraud ; as concealment of title, &c. and equity will not suffer the statute of limitations to run, except from the time at which the fraud is known.

From the knowledge of the fraud the bar in equity begins to run (x).

So equity may protect a plaintiff, seeking this right, from being barred by the statute of limitation or nonclaim on a fine, while a bill of discovery is depending, and the defendant is withholding evidence of which the plaintiff is entitled to avail himself (y).

Though implied trusts are in general liable to be barred by time, there is an exception to a certain extent in favour of infants.

When a trustee for an infant sleeps on his title, and a stranger enters, he becomes, by construction of a court of equity, liable to account to the infant for the profits.

\*During the infancy, the *cestui que* trust will not be barred by the possession of this trustee by construction. But from the period at which the infant shall become adult, he must be active in asserting his title, or he will be liable to be barred by time, in like manner as if he had not been an infant. A case of this sort may change the jurisdiction from a court of law (in which the title of the trustee may be barred) to a court of equity ; to have the protection of that court from the legal effect of the statutes of limitation.

And a trust for a class of creditors, as a body, does not impose on them the same duty of diligence as on individuals.

For that reason equity will allow of a greater latitude of time, for the relief of general creditors from a breach of trust, than it would allow to persons having titles as individual persons.

In cases of infancy, &c. courts of equity, in reference to equities of redemption and of trusts, allow to infants, *femes covert*, &c. the like protection as is afforded to them by the statutes of limitation.

In courts of equity, all rights are considered as *possessory* ; and twenty years is, or seems to be, the period of limitation ; but, as in the instances of infancy, &c. the statute law protects infants, &c. unless ten years can have run against them \*since [\*386] these disabilities cease (yy). Courts of equity have followed the statute, by adopting into their analogy similar exceptions in favour of persons entitled to the equity of redemption, or trust, and the courts have uniformly allowed of this exception.

Thus, in *Belch v. Harvey* (z), Lord *Talbot* declared it to be his opinion, " That whereas this court had not in general *thought proper* to exceed twenty-years, where there was no disability, in imitation of the first clause of the statute of limitations ; so after the disability removed, the time fixed for prosecuting in the proviso (which is ten years,) ought in like manner to be observed."

(u) *Moseley*, 72 ; 2 *Jacob & Walker*, 201.

(y) *Pineke v. Thorncroft*, 3 Bro. C. C. 338.

*Collerell v. Dutton*, 4 Taunt. 826.

(x) 2 *Schoales & Lefroy*, 634.

(yy) *Doe v. Jesson*, 6 East, 80 ;

(z) *Mich.* 1736, 3 P. W. 288.

In *Corbett v. Barker*, 3 Anstr. 755, it was said, *arguendo*, "It is clear that a remainder-man may redeem during the life of the tenant for life; and that if he does not, the time runs against him. And a tenant by the curtesy is considered for this purpose in the same light with any other tenant for life. If the tenant for life will not join in redeeming, the remainder-man may alone redeem, and then foreclose him; if neither redeems, the court interferes to prevent the mortgagee from being disturbed after twenty years. When the

time has once begun to run, it is immaterial to him who are [\*387] the parties entitled, or how the interest is divided, \*nor is the tenancy by the curtesy any bar to it." Several cases were cited, but none of them goes the length of the doctrine.

But it seems that when there are successive estates in the equity of redemption or trust, the owner of each successive estate (z) would have twenty years; or in case of disabilities, ten years, after the disabilities ceased, for the assertion of his title.

But with this qualification; that if the time once begin to run, it cannot be enlarged by any subsequent disposition of the owner entitled to the equity or trust; a principle which may be collected from the judgment delivered by C. J. Mansfield, in *Goodright v. Ferres-ter* (a), and from other authorities (b).

These observations are offered with great diffidence; as a step towards a systematic arrangement of this intricate subject. But they are to be received and adopted with great caution; and after a minute investigation of the authorities.

Acquiescence may also be a bar to equitable relief.

But there is not any determinate time which constitutes the bar to relief, under this head of equity. Every case depends on its circumstances, and the degree of inconvenience which would arise from affording relief.

[\*388] \*Less than twenty years may be a reason for withholding the assistance of the court.

In one case fifteen years (bb), and in another case nineteen years (c), was deemed an answer to the plaintiff's demand.

This subject was amply discussed in *Chelmondeley v. Clinton*, and most of the cases were cited.

His Honour observed (d), "All that has been said about acquiescence, either on the part of Lord Clinton, or Sir Lawrence Palk, seems to be irrelevant in a case where all parties were under the influence of the same common mistake." This part of the judgment is questionable. It was supposed, that knowledge of the facts which constitute the grounds of title, and the admission that the title is in another, call the doctrine of acquiescence into operation.—Persons who know the facts must be presumed to know the law arising from the facts.

(z) 2 Merivale, 240, *arguendo*.

(bb) *Swanton v. Raven*, 3 Atk. 105.

(a) 1 Taunt. 578.

(c) 1 Vesey & B. 23.

(b) Page 386 a.

(d) 2 Merivale, 382.

*Of the relative Characters and Situations of the Disseisor and Disseisee.*

A DISSEISOR is a person who acquires a seisin without any title. A necessary effect of a disseisin is to divest the estate of the former owner, and convert it ; at first into a right of entry ; and eventually, by a descent<sup>(c)</sup> which tolls an entry, or by the statute of limitations of \*21 James I. which takes away the entry, [\*389] into a right of action. But the estate of the disseisor, while it remains subject to a right of entry, may be defeated by the entry of the rightful owner ; or by the action of such owner, so long as his remedy by entry or action continues ; or the estate may be restored to the rightful owner by remitter.

The right of entry or of action may be barred by the statute of limitations, or by nonclaim on a fine ; and it may also be bound or precluded by re-lease, confirmation, and the like acts of the disseisee, or his heirs, or by a warranty.

Whenever, therefore, a title commences by disseisin, or, in other words, without any right, it is important to ascertain that not only the right of entry, but the right of action, has been effectually barred ; for while there exists a right of entry or of action in any other person, the title will be defective, unless a re-lease, or extinguishment of the right, shall be obtained.

In old books much curious learning will be found respecting disseisin ; and care must be taken to distinguish between actual disseisin and disseisin at election ; namely, cases in which a party thinks fit, as against a trespasser, to suppose himself disseised, merely for the sake of taking his remedy by assize or other real action.

This subject was much discussed in the case of *Doe ex dem. Taylor v. Horde* (e).

\*But the doctrine of Lord *Mansfield* in that case savours [\*390] of too much refinement to be implicitly adopted, to the extent of the principle on which it was urged.

And in the late case of *Goodright v. Forrester* it was admitted that Lord *Mansfield's* doctrine could not be supported.

In the argument of *Goodright v. Forrester*, and also in a former section which contains extracts from that argument, a general view of the learning of disseisin, as applicable to the present times, will be found.

Every abatement and intrusion is in effect a disseisin ; and whenever a man enters into land without having any title, and claims the fee or even the freehold, except it be a particular estate divided from the inheritance (ee), he is necessarily a disseisor in fee. For unless he had a seisin by his entry, his possession could never become rightful by re-lease or confirmation ; nor could his title be perfected under the statutes of limitation, or of nonclaim on fines.

(c) 1 Burr. 60.

(ee) 1 Inst. 276 a. 180 b.

But if he enter claiming a *term for years*, or a right to occupy, without asserting any title to the freehold, the real owner may treat him either as a mere trespasser, or as a disseisor, or as a tenant; and if he treat him as a disseisor, there is a disseisin by election; since it is optional with the owner whether he will consider himself as disseised or not (*f*).

[\*391] \*So if a man receive the rent of my tenant, he does not by that means, *ipso facto*, gain the freehold. But if I think fit to treat him as a disseisor, I am at liberty to do so (*g*).

On the other hand, I may contend that, in point of law, the possession of the tenant is my possession; so that my seisin continues notwithstanding the receipt of the rent by a stranger.

This doctrine is of great importance, and even essential, in considering the effect of a fine, to operate by way of nonclaim, and whether the entry has been taken away by descent; in short, whether the freehold or seisin be in *A* or in *B*, or whether the statute of limitations has operated.

But when a man enters on my tenant, and ousts him and claims the fee (*h*), this would be an actual ouster of the termor, and also of the reversioner; and consequently a disseisin even against my will, as has already been shown.

But when the person who enters merely claims the *term*, this entry, though it be an ouster of the termor, will not be a disseisin of the reversioner.

So if there be tenant for life, remainder to me in fee, a disseisin of the tenant for life will be a disseisin of the remainder; with the exception, that when the title to the particular estate is merely in dispute, and the disseisor claims the life estate only, without  
[\*392] asserting \*any title to the inheritance, the remainder-man or reversioner will not be out of the seisin (*i*).

No conveyance by a termor for years, while he continues a termor, will be a disseisin; and therefore if he levy a fine while he is a termor, the fine may be avoided by a plea of *partes finis nihil habuerunt* (*ii*).

To gain the freehold in such case, the termor should put an end to his term, and for that purpose make a feoffment (*k*); for a feoffment is of such forcible operation, that it must necessarily gain the freehold.

As an antidote against the practice of assigning terms to attend the inheritance, and then making a feoffment to acquire the fee, the note to the 2d vol. of *Conveyancing* (*l*) should be read.

A feoffment should be made by a *cestui que trust*, if for any reason he may wish to divest the legal estate of freehold out of his trustee.

(*f*) *Blundell v. Baugh*, Cro. Car. 302; 1 Inst. 271 a. 56 b.

(*g*) 1 Inst. 324 b.

(*h*) Litt. § 411.

(*i*) 1 Inst. 276 a.

(*ii*) Cruise on Fines, 310.

(*k*) 1 Inst. 330 b.

(*l*) Preface to 2d edition.



At the same time, it is apprehended that an entry with a declared purpose of disseising the trustee would have that effect. Lord *Hardwicke* (l) admitted there might be such disseisin.

And there are many cases, as the insanity of a trustee, his absence beyond the sea, or the like circumstance, in which it is highly expedient, that a feoffment should be made by the *\*cestui* [\*393] *que* trust, in order to divest the seisin out of the trustee.

A few general rules may be stated in this place, though their substance will be found in former pages.

1st, The possession of a termor, or of a particular tenant, is the possession of him in the reversion or remainder (ll). The observation in *Roe v. Elliot* (m) is to be read with this qualification, namely, a fine by a person who has a remainder after an estate of freehold, cannot be adverse against those in remainder or reversion, while the freehold continues in the person to whom the freehold belongs (n).

But if the remainder-man disseise the freeholder, then a fine afterwards levied may operate against the freeholder. The entry will also divest the estates in remainder or reversion; consequently convert these estates into a right of entry; and the fine may eventually bar them, and render it necessary that an actual entry to avoid the fine should be made prior to the commencement of an action of ejectment; and that one demise in the ejectment should be laid, as on a day subsequent to the entry.

Let it also be remembered, that a fine levied by a person who has a reversion or remainder after an estate of freehold, may be a protection to their common title, under the same seisin; \*and [\*394] unless it be avoided as a forfeiture, it may be a bar to rights and titles existing at the time of the fine levied, and which might be asserted in opposition to those who have the seisin or estate (nn).

2dly, If tenant for years be ousted, and the reversioner or remainder-man be disseised, the re-entry of the tenant will also restore the estate of the reversioner or remainder-man, while that estate shall be merely turned into a right of entry; but when it shall be turned into a right of action by a descent, &c. so that the seisin under the reversion or remainder cannot be restored without an action; the re-entry of the termor would in a case so circumstanced be good only *pro interesse suo*.

3dly, No estate can be barred by the operation of a fine, unless it be divested or discontinued at or before the time when the fine is levied, or by the operation of the fine (o); and therefore, if *A* be tenant for life, remainder to *B* for life, remainder to *C* in fee, a fine levied by *B* during the life of *A*; and while *A*'s seisin continues, will not, in any event, operate as a bar to the remainder. For the seisin of the tenant for life is the seisin of those in remainder; and

(l) *Hopkins v. Hopkins*, 1 Atk. 501. (ll) 1 Inst. 324. (m) 1 Selwyn & B. 85.

(n) *Gallan's case* in *Focus v. Salisbury*, Hard. 400, cited 1 Taunt. 506.

(nn) Irish Term Rep. 567. (o) *Prodger's case*, 9 Rep. 104; *Seymour's case*, 10 Rep. 85.

as the remainder was not divested or discontinued before the fine was levied, nor by the operation of the fine, the fine, instead [\*395] of becoming a bar to the estate of \*the remainder-man, constitutes a part of his title ; since whatever act tends to give stability to the particular estate, except a confirmation of that estate alone, tends to strengthen the title of those in remainder (p).

The late case of *Roe v. Elliot* (q) is law on this principle.

A confirmation of an estate in remainder will of necessity be a confirmation of all the prior estates ; since to defeat the prior estates would be to defeat the seisin which created these estates, and consequently the remainder. This is a rule flowing from principles of tenure, and drawn from the nature and effect of livery, &c. (r).

When the fine does not, in the first instance, operate adversely against the remainder-man or reversioner, it cannot eventually become a bar ; and therefore no subsequent adverse possession will give operation to the fine, as against those in remainder or reversion, their title would be protected by the fine.

The estate of a disseisor, though originally wrongful, may become rightful by a release of right, from the persons competent to release that right, or by a confirmation, or by an estoppel, which concludes the persons entitled to enter or claim, as a fine levied by a disseisor to a stranger (s).

[\*396] \* And the title which is defective may become complete by a bar to the right of entry or of action of the person in whom the right of entry or of action resides ; as by nonclaim on a fine, by the statute of limitations, &c. or by a warranty ; but under different circumstances of the title, the mode of barring the right of entry or of action will be different. For example : issue in tail cannot be barred, unless by a fine with proclamations, or by a warranty, and not by a warranty, unless such warranty be particularly circumstanced ; for instance, a lineal warranty, with assets, or a collateral warranty without assets, by a person who has an estate-tail in possession ; and by a tenant in tail in possession may, it is presumed, be understood a person having a right of entry, or of action by reason of an entail, which, if not turned into a right of entry or of action, would be an estate-tail in possession.

A disseisor is in all other respects to be considered in the same situation as a rightful owner ; with the difference, that his title is defeasible by the entry, or, according to circumstances, by the action of the rightful proprietor. And a title thus circumstanced should be arranged under two heads, so as to show the state of the title ; first, under the seisin, and secondly, under the right.

And whenever a bar by the statute of limitations, or nonclaim on fines, is relied on, it will not be sufficient to allege that [\*397] five years \*nonclaim on a fine, or twenty years under the statute of James, have elapsed.

(p) *Corhampton v. Corhampton*, Irish Term Rep. 567 ; *Prodger's case*, 9 Rep. 104 ; *Goodright v. Jones*, 1 Cruise on Fines, 249.

(q) 1 Selwyn & B. 85.

(r) Litt. § 521.

(s) *Buckler's case*, 2 Rep. 55.

It must be shown who was the person for the time being entitled to claim, and against whom the statute first began to run, for the purpose of satisfying the purchaser that the person having the right was in a situation to claim when the last proclamation was made; or, if he then laboured under any disabilities, that five years non-claim on a fine, or ten years adverse possession under the statute of limitations, have run since the disabilities were removed; and when there have been continual and successive disabilities, without any intermission, still the statute of nonclaim will begin to run from the time of the death of the person to whom the right first accrued, or which shall first happen from the time at which the disabilities shall cease (t). See the language in the saving clause of the statute of nonclaim on fines, and *Zouch v. Stawell* (u).

And when there are particular estates and remainders, the statute will, as already stated, begin to run against each remainder-man, only from the time of the determination of the prior estate; and of course it must be shown when the prior estate determined.

In the statute of Hen. VIII. which limits the remedy by writ of right to sixty years, \*there is not any saving for in- [\*398] fancy, coverture, &c.; so that the statute will begin to run against persons labouring under these disabilities.

Hence it has been concluded, that a title after sixty years adverse possession must necessarily be good. This however is not the case. There may be a remedy to recover an estate in remainder or reversion after prior particular estates in tail after a period however indefinite, as has, in several parts of this work, been already noticed.

A disseisee of every species is the person whose seisin is devested by a disseisin, and he retains the character of a disseisee till his seisin shall be restored by entry, action, or remitter.

Immediately after the disseisin the disseisee has a right of entry.

This right, as has been already noticed, may be converted into a right of action, and such right of action or of entry may be barred by the statute of limitations, by nonclaim on a fine, by re-lease, or even by estoppel.

Though a different opinion is expressed on this point in some books, the authorities favour the conclusion, that a fine levied by a disseisee during the disseisin, and to a stranger, will extinguish the remedy of the disseisee and his heirs by way of estoppel (vv).

A disseisee has not any devisable interest (x); nor can he grant any estate by way of \*conveyance. He may [\*399] confirm the estate of the disseisor, or of any person claiming under him by lease or otherwise; and he may bind his interest by way of estoppel, confirmation, &c. &c. He may re-lease to the terre-tenant in possession, reversion, or remainder (xx). A re-lease to one of these tenants will be for the benefit of the others, and one

(t) *Doe v. Jenson*, 6 East, 80; *Cottrell v. Dutton*, 4 Taunt. 826.

(u) *Flow. Com.* 348. (vv) *Buckler's case*, 2 Rep. 55; *Moore's case*, Palm. 365.

(x) *Goodright v. Forrester*, 8 East, 552.

(xx) *Litt.* § 465.

of them, or one of two joint-tenants, being in by title, may take advantage of a release to the other (y).

But a re-lease from a disseisee in fee, as distinguished from a disseisee for life or in tail (z), to one of two disseisors, will operate as an entry and conveyance, and will annex the right or title to the possession, and enable the re-lessee to exclude his companion.

A re-lease has, without much attention to accuracy, been termed the conveyance of a right.

The characters of disseisor and disseisee exist, or rather are applicable only while the disseisin continues in force. For that reason, the better course will be to contrast the different situations in which the disseisor and disseisee stand, in relation to each other, while these denominations apply to these several parties.

1st, The seisin is in the disseisor ; and it is out of the disseisee.

The gain of one is the loss of the other : and when there [\*400] are \*conflicting titles, seisin cannot be in two persons when one has a title in opposition to the other.

2dly, During the disseisin, the disseisor may grant a lease to operate on his estate or interest, but a disseisee cannot grant a lease to operate in any other manner than by estoppel ; and although he should make a lease, by way of *escrow*, to be fully and finally delivered after he had entered ; yet a second delivery after entry would not give effect to a lease which was inoperative at its inception (zz).

And after an ouster of a termor for years, and a disseisin of the reversioner, an action of waste will not be maintainable against the termor, since no reversion is existing (a).

A disseisor may make a charge by way of grant of annuity, to continue until his title shall be defeated ; but a disseisee cannot make a valid charge to take effect, at law, even after his seisin shall be restored (b).

A disseisor may be a re-lessee of a right, or of a title of entry from the disseisee, or from any other person, because he has the seisin or estate (bb) ; but a disseisee cannot be a re-lessee of a rent-charge (c), because he has not any seisin or estate in which the rent can be extinguished.

It is true, that while he remains tenant to the lord by reason of privity, that is, till the lord has accepted, or the law has [\*401] given to the \*lord a new tenant, the disseisee is capable of a re-lease from the lord, by way of extinguishment of rent, or services due from him to his lord (d).

Again ; the disseisor may be a re-lessee either from the lord, from a stranger, or from the disseisee himself ; and a re-lease from the lord to the disseisor would put an end to the privity of tenure between the lord and the disseisee, until the disseisin shall be determined (e).

In all cases, without exception, the disseisor is the tenant of the

(y) Litt. § 472. 522.

(zz) *Jennings v. Bragg*, 2 Rep. 35.

(bb) Litt. § 455.

(c) Perk. § 594.

(z) 1 Inst. 275 b. 276 a ; 1 Inst. 194 a. b.

(a) 1 Inst. 556.

(b) Perk. § 65 ; Litt. § 527.

(d) 1 Inst. 268.

(e) 1 Inst. 268.

freehold ; he is the person answerable to the precipe of a stranger ; but in no case, nor under any circumstances, is the disseisee the tenant of the freehold, or the person to be sued in a real action. Hence, in common recoveries the writ of entry must be brought against the disseisor, and not against the disseisee.

The doctrine of Lord *Mansfield*, in *Taylor v. Horde* (*d*), on this subject, must be read with great distrust. The argument of Mr. *Knowler*, and not the doctrine of Lord *Mansfield*, does, it is apprehended, state the law most correctly.

The learning advanced by the noble Lord has oftentimes been questioned. Lord *Kenyon* never spoke of it with temper. He is well known to have entertained an opinion in direct opposition to that doctrine ; and in *Goodright v. Forrester* (*e*) it was distinctly admitted by \*the court, though the point is not re- [\*402] ported, that the doctrine of Lord *Mansfield* was not tenable.

In consequence of the doubts expressed by Lord *Mansfield*, whether the disseisor became the tenant to the writ of entry, there are many cases in which, under circumstances of great urgency, it may be advisable to make a feoffment preparatory to a common recovery.

Few persons understood the subject of disseisin better than Mr. *Pigott* ; and he considered a disseisor or his alienee as a good tenant to the writ of entry (*f*) ; and it would be difficult for any court to deny that a recovery was duly suffered, if suffered on a writ of entry against the feoffee of a person who held, even for years determinable on his life. The courts would do all in their power to invalidate a recovery suffered under these circumstances ; but the difficulty is for them to find a rule of law under which they can sanction an objection against the recovery. Can they resort to the learning of fraud to impeach the feoffment ? To admit that tenant for years may make a feoffment for every purpose, except for qualifying a tenant to a writ of entry for suffering a recovery, would be a singular decision, and a solecism in law !

Again, because the disseisor has the freehold he may endow a woman entitled to dower (*g*) ; but a disseisee cannot endow a woman who is \*entitled to dower, even as against him- [\*403] self ; and yet no act is more favoured in law than endowment, or the perfection of a title to dower (*h*).

Also the wife of a disseisor, being a stranger ; or of a lessee at will, or for years, making a feoffment (*i*), may acquire a title of dower by reason of her husband's seisin ; defeasible nevertheless under the same circumstances as his estate is defeasible ; but a woman, though dowable of a seisin in law ; as in the instance of an heir, of whose seisin there is an abatement ; or of a remainder-man, or reversioner, on whose seisin there is an intrusion ; as well as of a

(*d*) 1 Burr. 60. (*e*) 8 East, 552. (*f*) *Pigott, Recov.* 40. (*g*) *Perk.* § 246.  
(*h*) *Perk.* § 426. (*i*) *Preston's Essay on Estates*, chap. Dower.

seisin in fact, is not dowable, when her husband has, at the time of her marriage, or afterwards, a mere right or title of entry, as distinguished from a seisin in fact, and from a seisin in law. Thus, if a man marry after he has been disseised ; or if an heir marry after an abatement on his seisin ; or if a remainder-man, or reversioner, marry after an intrusion, his wife will not be dowable (*k*).

There are a few distinctions on this point deserving of notice ; first, a woman is dowable of an actual seisin during the coverture ; secondly, she is dowable of a seisin in law, when there is such seisin

of the freehold and of the inheritance, *simul et semel* ; thus, [\*404] when lands descend to a man as heir, and he is \*married,

but a stranger abates on his seisin, and acquires an actual estate ; or if a man is married, and seised of a reversion or remainder, and he has a right of entry by reason of the determination of particular estates, but he is disseised by the intrusion of a stranger ; in each of these instances the wife will be dowable. The ground seems to be, that she ought not to suffer for the *laches* of her husband ; but, under the like circumstances, a husband would not be tenant by the curtesy of the seisin of his wife ; and even a woman, if not dowable when her husband has been disseised before the coverture, and consequently before the title of dower was *inchoate* ; and even though the husband has a seisin during the coverture, expectant on an estate of freehold, either *for life or in tail* ; yet a disseisin of the particular tenant, and as a consequence of the reversioner or remainder-man, would prevent the attachment of a title of dower ; since it would exclude the husband even from a seisin in law of the immediate freehold ; for there cannot be a title of dower without a seisin, either in fact or in law, of the freehold and of the inheritance, at one and the same time.

As the disseisor obtains the seisin of the land, he may give seisin of a rent-charge to a person entitled to the rent (*l*).

But as the disseisee has not any seisin of the land, he [\*405] cannot give seisin of the rent (*m*). Nor \*can a tenant for years give seisin of a rent-charge by the payment of that rent.

And though a disseisor and disseisee should join in a feoffment, or in a lease, such feoffment or lease would be considered as the feoffment or lease of the disseisor (*n*).

But if the disseisee had entered while his entry was lawful, and prior to the feoffment or to the lease, then the feoffment or the lease would have proceeded from him.

And even though a man should enter on his own tenant for life, and disseise him, he would acquire a new estate under a new title, and not retain his old seisin or estate ; and therefore could not grant his reversion by that name (*o*) ; and if he had been tenant

(*k*) 1 Inst. 31 a ; Perk. § 386. (*l*) *Breddyman's case*, 6 Rep. 58 a. (*m*) *Ibid*.  
(*n*) 1 Inst. 218 ; Perk. § 57. 218 ; Litt. § 476. (*o*) Hob. 323.

in tail he would not have effected a discontinuance, because he was not seised by force of the entail (p).

Finally, the seisin or estate of a disseisor is assets descendible to his heir.

But a right or title of entry of a disseisee will not be assets in the hands of his heir until the seisin shall be restored (q).

These observations are equally applicable to the person who is the disseisor or disseisee, under each species of disseisin, except so far as there may be a difference, arising from a relation or privity between the very lord and very tenant.

Under the doctrine derived from the feudal system, the lord is not obliged to accept the disseisor as his tenant; for [\*406] the lord has the option of considering the disseisor or disseisee as answerable for his services (r). Hence it follows, that until the lord has accepted the disseisor as tenant, he may claim the benefit of an escheat on the death of the disseisee without heirs (s). After the lord has once accepted the disseisor for his tenant, the privity ceases between the lord and the disseisee, and the lord is precluded from claiming the benefit of an escheat on the failure of heirs of the disseisee during the disseisin.

It is also observable that the alienee of a disseisor necessarily becomes tenant to the lord, since he takes under a feudal contract.

And the heir of a disseisor becomes tenant to the lord, even against the lord's will.

A few additional observations will supply all that is material on the relative situations of these persons.

1st, The disseisor is in the seisin; he may devise by will; and it seems to be law, that a right or title of entry or of action is not devisable; and therefore a disseisee cannot make a disposition by will. The point was so decided in *Goodright* and *Forrester* (t); but in the exchequer chamber this point was not considered to be so clear as it seems to have merited. However the Chief Justice left the former judgment in full force.

\*There is an uniform concurrence of authorities, that [\*407] a will by a person who is seised will be revoked by a disseisin, and not called into operation, unless the seisin shall be restored in the life-time of the testator (u).

Is it not then absurd, that a disseisin after a will duly made, should take from the will its operation; and yet a man who is disseised should, while he is a disseisee, be able to make a valid will?

The learning of estoppels, though discussed in a former part of this volume, properly belongs to this division; since, for the most part, it is applicable to acts proceeding from a person who is out of the seisin.

It must be admitted, and it has been shown that this doctrine

(p) Litt. § 837. (q) 6 Rep. 58.

(s) 1 Inst. 268; Litt. § 454.

(u) *Bunker v. Cook*, Salk. 237; *Gill*. Dev. 126.

(r) Litt. § 454; 1 Inst. 268.

(t) 8 East, 552.

takes a large range. It is relevant to assurances proceeding from an heir apparent, an heir presumptive, or even a stranger.

An estoppel, it will be remembered, is in effect a conclusion on a man to aver the truth in pleading or in evidence. A protestation may be defined to be an exclusion of a conclusion (x). In short, its object is to guard against an estoppel.

The general principle of the learning of estoppel is founded on the ground that a man shall not defeat his own act, or deny its validity: for example; if a deed is prepared for a man, [\*408] \*who is called *John*, while his name is *William*, and he executes the deed in the name of *John*, he is precluded from avoiding the deed, by averring that his name is *William*; but had he executed the deed by his proper name he would have been at liberty to have avoided the deed, as not being his bond, his grant, &c.

So when a man does, in his deed, recite particular facts, these facts become evidence against him; and he will not be at liberty to deny the truth of this statement. But the learning of estoppel takes a much larger scope; and to understand it with any degree of accuracy, it will be proper to consider the law on this subject as applicable to feoffments, fines, recoveries, deeds of demise, and deeds of grant.

First, as to feoffments. From the solemnity with which a feoffment is made, and still more, from its necessary operation to carry the fee-simple, it puts the feoffee into the seisin, and the feoffor will never be at liberty to avail himself of a title acquired subsequent to the feoffment. This was one of the many advantages which were derived from a feoffment; and in favour of feoffments, it may be said it excels a fine or recovery; since it clears all disseisins, abatements, intrusions, and other wrongful estates, *when the feoffor may lawfully enter*.

It is quite clear that a stranger, or a tenant at will, or tenant for years, may make a valid feoffment; and this feoffment will be good as against him, though not against his heirs, in [\*409] \*respect of any estate which may subsequently devolve on him. So if an heir apparent, or heir presumptive, should make a feoffment in the life-time of his ancestor, and after become heir, the feoffment would be an estoppel against his assertion of title; and for this purpose, a feoffment, by an heir apparent, or by an heir presumptive, or by a man who afterwards purchases for a valuable consideration, stands on the same footing.

Secondly, As to fines and common recoveries. All the observations made on feoffments are applicable to assurances by these matters of record. There is one circumstance, however, in which they differ, viz. although the fine or the recovery might operate in the nature of a grant, and not of a feoffment, in other words, might operate without passing the immediate freehold, still



it would produce the effect of an estoppel; and this estoppel binds the heir as well as the parties.

Thirdly, as to demises. The distinction is between demises by indenture, and demises without indenture. That there may be an estoppel, there must be a demise by deed indented, and even between indentures of demise on the one hand, and feoffments, fines and recoveries on the other hand, there is a marked difference. An indenture of demise can never operate as an estoppel to any extent, when it can operate as a lease, in point of interest, for any part of the term: for example; if a tenant \*for life lease [\*410] for one thousand years, this lease will determine with his death, under the rule *cessante statu primitivo cessat derivativas*; and no subsequent acquisition by descent or by purchase will, in a court of law, give extension or continuance to the lease.

When a court of equity interposes and affords relief, it bottoms the relief on the ground of contract, and compels the party to give effect to his contract by a new lease.

But if a man, not having any estate in the land, grant a lease for ten, twenty, or more years, and afterwards acquire the fee-simple, or any other estate, this estate will feed the estoppel; and the lease will have effect on the ownership thus acquired.

Fourthly, mere grants by deeds of estates of freehold, with or without indenture, and whether they are to operate by way of grant, re-lease, or of confirmation, will not, in a court of law, amount to an estoppel. For example; a grant by a man, who is an heir apparent, or heir presumptive, or by a man who has a mere right or title of entry, or of action, in consequence of disseisin, will not have any effect at law, although the heir or the devisee should afterwards become actually seised; and a surrender of copyhold lands always operates by way of grant; and not tortiously, or by way of wrong. Hence the division of conveyances into those assurances which are rightful, and those which are wrongful.

Those which are rightful are thus \*distinguished, because [\*411] they never pass more than the party may rightfully convey; as distinguished from feoffments, fines, and common recoveries, which, on many occasions, operate wrongfully, by discontinuing or barring estates, which are not in the grantor.

Sometimes a fine is levied, or recovery is suffered, by a person who has been disseised while he is out of the seisin; and sometimes such fine is levied, or recovery suffered, by a person in the seisin, and at other times by a mere stranger.

A fine, or common recovery, levied to the person in the seisin, will operate by way of re-lease of right, in confirmation of the title; and when the fine is levied, or recovery suffered to a mere stranger (y), it will benefit the person in the seisin. This benefit arises under the learning of estoppel.

The conusee in the fine, or the recoveror in the recovery, can-

not take any benefit from the fine, or from the recovery, because it is incompetent to the grantor in the fine or recovery to transfer his right of entry or of action; and the person who has the seisin may take advantage of the fine or recovery to estop the grantor in the fine or recovery, and his heirs, from claiming the land contrary or in opposition to the fine or recovery.

In these observations, it is assumed, that the fine or recovery [\*412] very imports a grant of the fee; \*for there is a material difference in law between a fine *sur concesserunt* for years, and a fine which imports to be a grant of the fee. A fine for years will merely bind the right when it shall descend, or the seisin when it shall be restored, or an estate when it shall be acquired; while a fine which imports to grant a fee, will altogether intercept the title, and preclude the right of taking by descent, or enforcing the right of title of entry.

These observations on the learning of estoppel are drawn from the principles of the common law. The subject, with the cases; will be found in a former division, written to supply an omission supposed to exist, but which did not exist, in the original MS.

A large and copious class of cases, relevant to the situation of tenant in tail, and his issue, and arising out of the construction of the statutes of Hen. VII. and Hen. VIII. properly belongs to those divisions in which the effects of fines with proclamations, proceeding from tenant in tail, have been considered.

What descents take away the entry.

A descent to take away entry must be of an estate of inheritance, either in fee or in tail; and not of an estate of freehold to heirs as special occupants (z).

It must be to the *heir instantur*; for if the heir be an [\*413] *ventre sa mere* at the death of the \*ancestor, the heir will not be protected. This is an anomaly in law.

It must be to heirs, and not to the successors of a sole or aggregate corporation.

It must be of the inheritance, as conferring the immediate freehold; and not of the inheritance in reversion or remainder after an estate of freehold.

A descent from the immediate disseisor will not take away an entry unless he has been in the seisin for five years.

But a descent from his alienee, or even from the heir of the disseisor, will take away the entry, although the disseisin was within five years; except that an heir who was a party to the disseisin, will not be protected against his own wrong; and therefore an heir so circumstanced will be subject to entry.

When an action may be brought.

An action may be brought when there is a discontinuance by the alienation of tenant in tail, or the right of entry is taken away by

(z) 1 Inst. 239 a.

warranty, by the statute of limitations, or by a descent which tells an entry.

When there is a discontinuance by tenant in tail, the issue have no right of action during the life of the tenant in tail, nor even after his death, if they are barred by a fine with proclamations, or by nonclaim on a fine, or by the statute of limitations of 21 James I. c. 16, or by warranty; and the persons in reversion or remainder \*cannot maintain an action until there shall be [\*414] a failure of issue inheritable under the entail; and the determination of the right of enjoyment under any estate prior to that of the demandant in the action.

Some discontinuances are only partial, while others are of the fee; in other words, some discontinuances have a limit, and will cease, while others have no limit, and will not cease without some intervening circumstance.

For example; a tenant in tail may lease for the life of B, or may make a gift in tail.

Should this lease or gift determine in his life-time, the discontinuance would cease (a).

On the other hand, the discontinuance may be enlarged; and therefore, if after a discontinuance for life, the reversion should be granted for life, in tail, or in fee, and this estate should come into possession in the life of tenant in tail (b), the discontinuance would continue notwithstanding the determination of the estate which originally caused the discontinuance.

So a discontinuance may be created or enlarged by reason of a re-lease with warranty (c).

What remitter shall restore the seisin.

When there is a right of entry the seisin will be restored by an actual entry, or even by a lease, gift, or conveyance, which confers the right to \*enter; for the lessee, &c. will be sup- [\*415] posed by law to have the seisin under the old right, rather than a new estate under a defective title, which is in opposition to his right.

But then the lessee must not be bound by estoppel, to insist on his ancient title.

So when there is a right of action, if the immediate freehold be by act of law, or otherwise, cast on the person who has the right to the freehold, and that right be remediable, there will be a remitter to the old seisin or estate; so that the party will be seized by force of the ancient ownership; and a remitter to a person who has a particular estate, will be a remitter to all persons who have a right to estates in reversion or remainder: with these exceptions; a right of entry will not serve those who have merely a right of action; and a remitter to the freehold will not necessarily restore the estates of those who have merely a right of entry.

(a) 1 Inst. 333 a.

(b) 1 Inst. 333 b.

(c) 1 Inst. 328. 332.

Within what time a right of entry or of action must be prosecuted.

This subject is discussed in a former page. It will be obvious to the reader that the original arrangement did not provide for the division now under discussion.

By what means a right may be extinguished.

A right may be extinguished in the whole, or in part, by,

1st, Re-lease :

2dly, Confirmation :

[\*416] \*3dly, By the statutes of limitation, or nonclaim on fines.

4thly, For a time by warranty, since warranty is a defence, *pro tempore*, against the heir ; and not a bar to those who may eventually have the right, and not unite in themselves the characters of heirs (d).

Of the means by which an estate, which was wrongful, may become rightful ; and the means by which an estate, which was defeasible, may become absolute.

Immediately after disseisin, the disseisee has a right of entry or of action ; and he may be restored to the seisin by an actual entry (e) ; or by judgment and *execution* in a real action, by continual claim ; namely, by going on the land, or as near to the land as may be, within every year and day (f), and claiming the land as his freehold, or as his inheritance, &c. A claim near the land, without any actual entry, will suffice for the party, if he cannot make an actual entry from reasonable fear of personal injury ; also by the determination of a particular estate, which was the cause of the disseisin or discontinuance, before the disseisin has been enlarged (g) ; and lastly by remitter.

Sometimes, as by descents which toll entries, or by warranty, the right of entry may be \*changed into a mere right of action ; and when an estate-tail is discontinued, the remedy for restoring the seisin is by action, and not by entry.

A right of action cannot become a seisin without either, *first*, judgment and execution, or, *secondly*, remitter ; or a wrongful entry, namely, a disseisin by the person having the right, and a re-lease to him.

There is a difference, as already observed, between a right of entry converted into a right of action ; and a right of action, as a consequence of a tortious alienation by tenant in tail.

The right of entry is always a present and immediate right ; and so is the right of action arising from a right of entry, converted into a right of action ; because, in all these instances, there is either a wrongful possession, or there is a wrongful alienation in breach of the feudal contract, and which has occasioned a forfeiture ; but when a tenant in tail discontinues, no forfeiture is committed.

The alienee will be entitled to hold the possession, and retain the

(d) Litt. § 602, 603.

(e) Ibid. § 415 ; *Goodtitle v. Ridsden*, 9 Vin. Abr. Disseisin. M. pl. 6.

(f) Litt. § 414.

(g) 1 Inst. 256 a.

seisin, until that period or event shall arrive, at which the issue in tail, the reversioner or remainder-man, would have had the right of entry, in case no discontinuance had been effected (*b*).

In *Goodtitle v. Ridsden*, it was held, that confession of lease, entry, and ouster, was evidence \*of seisin. But that [\*418] doctrine is founded on a principle in opposition to *Littleton*, that the denial of title is a *new disseisin*.

Whoever may wish to trace this subject through all its niceties and varieties; in short, whoever wishes to become a well-informed lawyer on titles, must read those chapters in *Coke Litt. (c)* which treat of descents which take away entry; continual claim; discontinuance; remitter; re-lease; confirmation; and warranty.

In a secondary sense, an estate which was wrongful will become rightful, when it is discharged from the right, either by the statute of limitations, or by the statute of nonclaim on fines.

In a more proper sense, and in the signification usually adopted, an estate which was wrongful cannot become rightful by any other means than a *re-lease of the right*, or a *confirmation* of the title of the disseisor, or of his heir, or alienee, by the disseisee or his heir. And an estate which was defeasible by a condition, will not be absolute until the condition shall have been performed, or dispensed with, or have become impossible; or there shall be a re-lease of the condition, or a re-lease or confirmation of the right or title; or of the land; producing the effect of discharging or extinguishing the condition, and enabling the party who is in the seisin to hold absolutely, and free from the condition.

When there is a title to the possession, \*a re-lease to [\*419] one of two joint-tenants, for example, to one of the alienees of two disseisors, or one of two alienees of a tenant for life, the re-lease will operate for the benefit of both joint-tenants; but a re-lease to one of two persons, being disseisors by wrongful entry only, will give the title, and the right to the re-lessee in exclusion of his companion (*d*). This re-lease operates by way of entry and feoffment.

The *progress* of a title may be thus stated :

Whoever has a seisin in fact or in law, may lawfully enter at the time appointed for the commencement of his estate in possession, and may convey or alien, while he has an estate in possession, reversion, or remainder.

A person who is disseised may, at all times, enter until the right of entry be barred, either by a descent, which takes away the entry, or by the statute of limitations, or by nonclaim on a fine, or by some act proceeding from the disseisee himself, as a re-lease of right, confirmation, &c. of title, which precludes his right of entry. He cannot convey or alien to a stranger.

When an ancestor may enter, and dies, the right of entry will

(*b*) Vin. Abr. Disseisin, N. pl. 6.

(*d*) 1 Inst. 275 b.

(*c*) Litt. chap. Continual-Claim.

descend to his heir at law as representing him ; or it may be transferred by operation of law to the assignees, under a commission of bankrupt (e). But no instance can be found in which a right of entry or of action can be transferred from a man to the [\*420] \*devisee of his will ; for a right of entry or of action is not, for the purposes of alienation by will, a right in the nature of a possibility coupled with an interest ; although a contingent remainder, or an executory devise, is of that description ; since contingent remainders and executory devises flow from the present existing seisin, and depend on it, and are, in substance and effect, part of the same seisin ; while rights of entry and of action depend on a title which has been deprived of the seisin.

These observations are applied to rights of entry by reason of estates which were of a freehold quality. A man may be dispossessed of a term ; and while ousted he will have merely a right of entry.

This right of entry is not assignable by deed, but is transmissible to executors or administrators, as representing the person to whom the right belonged ; and from principle, it should seem to flow, that any directions contained in a will of the rightful owner concerning his interest in these leasehold estates, would be binding on the executor or administrator, and by that means give effect to a legacy or gift of the property by the will, after the property shall be recovered, and the assent of the executor or administrator to the gift shall be obtained.

When a right of entry no longer exists, an entry by the rightful owner will be wrongful, and will be a disseisin to the person [\*421] who has \*obtained the right of possession (f). And therefore, if the disseisee, after his right of entry shall be taken away, or his heir enter on the disseisor, or his alienee, and obtain the possession, there will be a new disseisin ; and the possession may be recovered by the disseisor or his alienee, in an ejectment, or by a writ of assize. *Littleton*, as already cited, is fully in point.

But if the person thus recently disseised should bring a writ of right, and join the *mise*, on the mere right, the rightful owner, the original disseisee, or his heir, would succeed ; since the *mere right* is in the original owner or his heir ; although the first disseisor, or his heir, or alienee, may have obtained the right of possession, as distinguished from the right of property, or the *mere right*.

With these observations this important and highly useful head of seisin and disseisin will be closed.

### *Of Titles under Heirs.*

As often as a title is derived within a period of modern date, from a person as heir, the fact that such person was heir should be ascertained.

(e) *Smith v. Coffin*, 2 H. Black. 444.

(f) *Supra*.

And in all instances of title depending on descents, except the fact be well known by the purchaser, or by those who act on his behalf, \*there should be evidence in support of the [\*422] pedigree. This evidence should be such as would be proper to be given to a jury, in the event, that the title should be litigated.

This is more particularly important when the title is derived from a remote ancestor; and the pedigree is to be traced through a variety of persons.

But when a title depends on a descent which took place at a remote period, as thirty years or upwards, to a person who then claimed as heir, and has been in receipt of the rents, or had an uninterrupted possession of the lands through the intermediate period, this circumstance affords a fair and reasonable presumption that the person who claimed as heir was heir, and supersedes, except under special circumstances, the necessity of further investigation.

On the other hand, when the title is questioned, or there is even a rumour of a claimant; it is particularly important to investigate the pedigree minutely and accurately; and to obtain full evidence of the real state of the title. The evidence should be such as to enable the purchaser to maintain the title in a writ of right, or other adverse proceeding which the title may admit.

In considering the title of an heir, it must be kept in mind that he must not only be *heir to the person*; he also must be *heir to the estate*.

In short, he must be *heir to the person last seised, and of the blood of the first purchaser*.

\*The steps to be taken are, to ascertain, first, the person [\*423] who was the purchaser; and secondly, the person who was last seised of the estate to which a title is to be made by descent.

To understand this subject fully, with all the various distinctions of which this learning is susceptible, *Blackstone's* chapter on Descents in his commentaries should be perused, and the invaluable Essay of Mr. *Watkins* on Descents, (an Essay which deserves the student's most serious attention) should be studied with particular care.

The rules or corollaries of descent should be treasured in the mind, as they must, on all occasions, influence the judgment, and lead to the most material conclusions. These rules are,

1st, Inheritances shall *lineally descend* to the issue of the person last actually seised *in infinitum*, but shall *never lineally ascend*; that is, a father, mother, or other lineal ancestor, as such, shall never succeed to a descendant; but a lineal ancestor may succeed in the character of a *cousin*.

2dly, The male issue shall be entitled before the female.

3dly, With the exception of gavelkind lands, in which the sons succeed together as coparceners; and of borough-English lands, in which the youngest son is preferred, and other customary lands, in which the course of descent is prescribed by the custom; the rule is, where there are two or more *males in equal degree*,

[\*424] \*the *eldest male shall inherit, but the females shall inherit altogether.*

4thly, Lineal descendants, *in infinitum*, of any person deceased, shall *represent* their ancestor ; that is, shall stand in the same place as the person himself would have done had he been living.

5thly, On failure of lineal descendants or issue of the person last seised, the inheritance shall descend *to the blood of the first purchaser*, subject to the three preceding rules.

6thly, The collateral heir of the person last seised must, (except as to estates-tail) be his *next collateral kinsman of the whole blood* ; hence the rule *seisina facit stipitem* ; and hence the rule or expression, *possessio fratris, de feodo simplici facit sororem esse heredem*, viz. excludes the brother of the half-blood. Thus, the person claiming to be heir in the collateral line to an estate in fee, not being an estate-tail, must be,

1st, The next collateral kinsman :

2dly, Of the whole blood to the person last seised ; or if there never was an actual seisin, then to the first purchaser, though he never was seised :

3dly, Of the blood of the first purchaser :

4thly, In *collateral inheritances*, the male stock of the first purchaser shall be preferred to the females ; that is, kindred derived from the blood of the male ancestors of the first purchaser, [\*425] shall be admitted into the succession \*before those of the blood of the female ancestor to the first purchaser.

These rules lead to the investigation of,

1st, Who shall be deemed the first purchaser :

2dly, Who shall be deemed the person last actually seised.

As to the first purchaser, the person to whom the inheritance is first given or conveyed, either by will, or by any other assurance, is deemed the first purchaser.

Every person who takes by purchase, as distinguished from escheat, and from descent, is the first purchaser of the estate : for example ; if *A* be seised in fee, and by his will devises to *B* (not being his heir) in fee, *B* is the purchasing ancestor.

So if a feoffment or any other conveyance be made by *A* to *B* in fee, or to uses under which the fee is limited to *B*, absolutely or in contingency, *B* will be the first purchaser, though his interest first vests in the heir.

Also when a gift is made to *A* in tail, *A* is the first purchaser of the estate-tail ; and if he suffer a common recovery, and by that mean enlarge his estate-tail into a fee-simple, and uses are declared of the recovery, either immediately or ultimately in favour of *A* ; or if the use result to him in fee, he will be deemed the first purchaser of the fee-simple ; not merely because the fee is first limited to him,

but because he was the first purchaser of the estate-tail ;

[\*426] and the use derived from the estate-tail \*will partake of the same descendible qualities in regard to the first pur-



chaser, as the estate-tail, if it had been an estate in fee, would have done.

So if a reversion or remainder in fee be granted to *A*; or limited to the use of *A*, not being the former owner; *A* will be deemed the first purchaser of the inheritance.

But there are acts by which the course of descent may be changed; for instance, if *A* seised in fee, *ex parte materna*, convey to *B* in fee, and *B* re-convey to *A* in fee; or if *A* being seised in fee, *ex parte materna*, levy a fine, *sur grant et render*, and thereby the fee is granted to *B*, who renders it to *A* in fee; in each of these cases there is a conveyance and re-conveyance; a grant and re-grant; and the course of descent will be changed; and *A* will become the first purchaser.

So if a man seised in fee, *ex parte materna*, convey to the use of himself in tail, or in trust for himself in tail, he will be deemed the purchaser of this estate-tail; and if he afterwards suffer a common recovery to the use of himself in fee, this fee will descend from him, as the first purchaser; for this estate in fee depends for its title on the estate-tail, and will descend from the first purchaser of that estate.

But if a man seised in fee or in tail by descent, *ex parte materna*, convey to the use of or in trust for himself in fee, either immediately, or after and expectant on several \*particular [\*427] estates; or if the use or the trust of the fee result to him by implication of law; this use or trust will have the same descendible qualities, as the estate, out of which it is derived, would have had; and will descend to the heirs of the first purchaser of the estate on which the title depends.

This rule is derived from the doctrine of courts of equity, which, as to uses and trusts, constituting part of the old ownership, preferred the heir to the estate under the former ownership.

So equities of redemption on mortgages in fee will belong to the heir to the estate of the mortgagor, and not to the heir of the person to whom by name the equity is reserved.

This rule of equity accomplishes by direct means that which the common law accomplished more circuitously.

By the common law, when a man seised *ex parte materna* conveyed in fee, subject to a condition, and died, the heir to the person of the grantor could alone take advantage of the condition.

But after this heir had reduced the estate by his entry or claim, the heir to the estate, in other words, the maternal heir, might enter upon him (g).

But this doctrine has been questioned (h). It certainly is an anomaly, and a departure from first principles.

\*So if there be an erroneous judgment against a man in [\*42

(g) 1 Inst. 12 b. 57 a.

(h) Robinson on Gavelkind, book 1, chap. 6, p. 121.

a real action, the heir to the estate, and not the heir to the person, must prosecute the writ of error.

However, the reason on which *Robinson* objects to the doctrine in *Coke Litt.* 12 b. is not quite satisfactory. In the case he quotes from 1 Inst. 215 a, the customary heir takes advantage of the condition in right of a reversion in him, since it is a condition annexed to an estate for years, and not a condition annexed to a grant of the fee.

The strongest case which can be objected to the doctrine of Lord *Coke* in 1 Inst. 12, is, that the heir to the estate, in other words, the heir *ex parte materna*, can alone maintain a writ of error.

Sometimes the descendant may be changed even by a devise to the heir.

On this subject there are several distinctions.

1st, The general rule is, that a devise of the fee generally, and without any limitation over, to a person who solely is the heir, is void ; since the devise gives to him the same estate as he would have taken by descent, and the law deems a title in him by descent to be his better title. Besides the gift is *actum agere*, and would, in respect of many privileges, prejudice the heir, if it intercepted his title as heir.

But the general rule applies only when the property is limited to the heir in fee ; and for the same extent of interest as he would have taken by descent ; therefore,

[\*429] \*2dly, Under a devise to the heir in tail he will take the estate-tail by purchase ; but even if the ultimate fee be limited to him generally, he will take this fee by descent.

Formerly it was the rule, that if a devise was to the person who was the heir, and to his heirs, subject to an executory devise in favour of a stranger, the heir would take an estate of a different quality from that which would have descended to him, and for that reason would have taken by purchase (i). In *Doe v. Timins* (k) the contrary was decided.

The same point was decided in *Hind v. Lyon* (l). Mr. *Watkins* adopted the opinion in *Hind v. Lyon*, without, as he admitted, full consideration ; indeed, it is to be wished that *Scott v. Scott* had been followed, as founded on a principle which fully supports it ; namely, that the estate taken by the heir is different in its quantity and its quality from the estate which would have descended.

It is different in its quantity, because on its first limitation it is bounded by the event by which it may be determined ; and secondly, it is different in its quality, since it is defeasible, or determinable, instead of being absolute.

So a devise in fee to one of several co-heirs will change the course of descent, and make the devisee the first purchaser (m).

(i) *Scott v. Scott*, Amb. 383 ; Eden's Rep. 458.

(k) 1 Barn. & Ald. 531.

(l) 3 Leon. 64.

(m) *Watkins's Descents*, 225, 3d edition ; *Reading v. Royston*, 2 Salk. 493 ; 3 Salk. 242.

\*This consequence is necessary to exclude the other [\*430] co-heir from taking any share.

So if a devise be to *several co-heirs*, either as joint-tenants or tenants in common in fee, they will take by purchase, and not by descent, since the quality of their estate is changed (*n*). In one case, they must take in joint-tenancy, and in the other case in common, instead of taking in coparcenary.

So if a devise be to the *heir and a stranger*, as *joint-tenants* in fee, the heir will take as a purchaser on account of the joint-tenancy.

But if a devise be to the heir and a stranger, as *tenants in common* in fee, the heir will, it is apprehended, take his share by descent.

There is not any decision on this point; but such was the opinion of Mr. *Fearne* (*n*), and this opinion is adopted by Mr. *Watkins* in his *Treatise on Descents* (*o*).

At first it may seem that this conclusion is in opposition to the law, that two coparceners to whom lands are devised as tenants in common in fee shall take by purchase. The cases are very different: for in that case, if the daughters took by descent, they would be seised *per my et per tout*, so that neither would have a share to herself; but each share would be held by the co-heirs in coparcenary, instead of being held as a distinct share, and a distinct *tenement*. This reasoning does not apply to a [\*431] sole heir taking a particular share exclusively; for as to him and the other devisee, it is the same as if this share had not been devised, since in the absence of a devise to the heir, the heir and the devisee of a moiety would be tenants in common.

It must not, however, be forgotten, that there are some cases in which a coparcener may take the entirety of the lands, and yet hold them by descent.

Thus, on a partition between coparceners, each coparcener will hold the lands allotted for him as a parcener, and consequently by descent (*p*); and even a rent granted for equality of partition will be descendible in the same manner as the land was descendible (*q*).

So on a descent to parceners by custom, one of them may be excluded by reason of advancement, and by refusal to bring the advancement into hotchpot; and the remaining parcener may take the remaining lands, although an entirety in the character of heir, and by descent.

The authorities which illustrate this subject are to be found in *Coke Litt.* chap. Parceners, and Parceners by Custom.

When the feudal tenures prevailed, and reliefs and other burthens of tenure were severely felt, there was a great anxiety on the

(*n*) Litt. § 254; *Watkins's Descents*, 223.

(*o*) *Watkins's Descents*, 3d edition, p. 270.

(*p*) Post, Works, 180.

(*q*) 1 Inst. 169 b.

(*q*) Ibid.

[\*432] \*part of tenants to prevent the descent to the heir, and the consequent burthens of tenure.

To guard against the various contrivances adopted to avoid the right of the lord to his fines, &c. we owe the rules,

1st, That a man cannot grant to his heirs, or heirs of his body, *eo nomine*, so as to make them purchasers (r) :

2dly, The rule in *Shelley's* case, that whenever in the same deed or will there are several gifts, either by way of limitation under the rules of the common law, or by way of use, or by way of trust ; one to the ancestor for his life, and the other to his heirs generally ; or to his heirs male or female, as heirs of his body ; either generally or specially, the gift to the heir or heirs of the body shall form part of the gift to the ancestor ; and on his death the heirs, or heirs of the body, shall take by way of descent, and not as purchasers.

This rule equally applies, whether the several limitations are mediate or immediate ; but it is necessary that the several limitations should give interests of the same quality, either both legal, or both equitable ; and that the heirs should be described with an intention that they should take in their character of heirs, and not by way of designation of particular persons ; and that the several limitations should be in the same deed or instrument, or in [\*433] component \*parts of the same instrument : for example ; in a *codicil*, as part of a will ; or in an appointment, exercising a power in another deed (s).

This rule of law admits of a great variety of distinctions, and of many anomalies and exceptions. It has invited a large portion of professional attention.

To understand this rule, and all its distinctions, the student should, in the first place, read those authors who have treated the subject in the most summary way. He should advance step by step into the discussion with those authors who have taken a more full, minute, and complete investigation of the subject.

The order to be recommended is to read,

1st, The observations of Mr. *Watkins* on this rule, in his *Treatise on Descents* (t) :

2dly, The succinct View of the Rule in *Shelley's* case :

3dly, Mr. *Hargrave's* view of the rule, as given in his *Juridical Arguments*, and in his note on *Coke Litt.* :

4thly, Mr. *Butler's* note on this rule :

5thly, Mr. *Fearne's* elaborate and comprehensive view of the rule ; as part of his work on *Contingent Remainders*.

It remains only to observe, that in copyhold lands, if the [\*434] ultimate fee be limited to the use \*of the former owner, or to his right heirs, though this be not strictly an use of

(r) 1 Inst. 22 b.

(s) *Venables v. Morris*, 7 Term Rep. 438 ; but see View of the Rule in *Shelley's* case.

(t) Page 159.

equitable jurisdiction, he will retain his old estate ; and of course it will be descendible from the first purchaser of that estate (u).

So if tenant in tail by descent, *ex parte materna*, suffer a common recovery of the copyhold lands, and the lands are re-surrendered to him in fee, this fee, according to the last decision, will be descendible to his heirs, *ex parte materna*, and not from him as the first purchaser (x).

But there are some propositions in the case of *Roe v. Baldwere* (y) which are rather singular. According to the doctrine of that case, if tenant in tail by descent from the maternal ancestor suffer a recovery, and declare the use to himself in fee, the estate will descend to the heirs *ex parte materna*, whether the lands be of copyhold or freehold tenure.

This, no doubt, is true as to freehold lands, because the use is, as to them, governed by rules which prevailed in courts of equity prior to the statute of uses.

But as to copyhold lands, the recoveror must be admitted, and after he is admitted, he surrenders to the use of the former tenant in tail and his heirs, and this surrender is a common-law conveyance, and the former tenant in tail \*takes by the [\*435] rules of the common law, without regard to the doctrine of uses, or any rule adopted by courts of equity.

This case, therefore, was, in argument, very accurately compared to a feoffment and re-enseffment ; and although Lord *Kenyon* observed in *Roe v. Baldwere*, that this case has been ingeniously argued on the forms of a recovery, and it has been compared, as to the copyholds, to the case of a feoffment and re-enseffment, yet this is by no means like the case of a feoffment and re-enseffment, and we cannot enter into these forms. They are, perhaps, inexplicable, but they must be taken as a mere mode of conveyance by a tenant in tail, and ought so to be considered in all respects ; and that it was so considered by the court in *Martin v. Strachan*. He added, that without wasting time in going through the doctrine laid down by Lord C. J. *Lee*, in that case, he thought they were bound to adopt the authority of it, and to apply it to both these species of property.

With great deference, however, this opinion seems to have been too hastily formed ; and is a proof that the most learned judges may be surprised into error. It is impossible, on principle, to distinguish the case of a recovery of copyhold lands, with a subsequent surrender to the former tenant in tail, from the case of a feoffment and re-enseffment. Both cases stand on the same footing ; and Lord *Kenyon's* \*observations destroy the distinctions formerly taken, and universally adopted on this point. They make every case bend to the authority of *Martin v. Strachan*, under circumstances to which that case has, in principle, no application.

(u) *Roe dem. Noden v. Griffiths*, J. Black. Rep. 605.

(x) *Roe dem. Crowe v. Baldwere*, 5 Term Rep. 104.

(y) *Ibid.*

They suffer a rule of equity to prevail over a rule of law, in a case in which equity never had any jurisdiction, either before or since the statute of uses.

And it may be safely said, that it never was in the contemplation of the court by which *Martin v. Strachan* was decided, to question the authority upon which the effect of a feoffment and re-enscoffment, or a fine *sur grant et render*, is grounded.

The reason of the cases in which the fee taken under a resulting use, or under a resulting trust, or under an express declaration of use, or under an express declaration of trust in favour of the former owner, will descend from the first purchaser under the former ownership, depends altogether on the rules applied by courts of equity, anterior to the statute of uses; and which, in reference to uses, after the statute, were embodied into the law, by the express provisions and enactments of the statute of uses; namely, that the estate arising from the use should be of the same quality with the use.

When a man seised in fee, *ex parte materna*, had conveyed to the use of himself in fee, and died seised of the use, a court of [\*437] equity considered \*the use or beneficial ownership to belong to the person who would have been heir to the legal seisin, in case the legal seisin had remained with the former owner (x). Thus the maternal heir, or other heir of the person by whom a conveyance had been made to the use of himself in fee, would, on a bill for an execution of the use or trust, by a re-conveyance, have been preferred to the heir of the person who had made the conveyance. In other words, the heir to the seisin, and not the general heir, or heir to the person, was considered to be entitled, on the ground, that, in equity, the ownership was not substantially changed. On this principle trusts and equities of redemption do at this day follow the same course of descent, as would have governed the legal estate, if that estate had remained with the grantor or mortgagor.

The rule of law, however, when unconnected with and independent of the statute of uses, totally disregards the former ownership. It merely respects the seisin as derived under the last conveyance, and considers the last grantee of the fee as the first purchaser, and as taking *feodum novum ut antiquum*, and not an estate descendible from a former ancestor, who, in point of fact, had been originally, and in the first instance, the person to whose acquisition the family were indebted for the property.

[\*438] \*To preserve a preference to the heir on the part of the first beneficial owner of the family, the estate, after a conveyance upon trust, or a mortgage in fee, which becomes forfeited, must be kept within the jurisdiction of a court of equity, so that the descent may be governed by the rules of that court.

From the moment the equitable ownership is changed into a legal

(x) See *Abbot v. Burton*, 11 Mod. Rep. 181.

estate, the title is withdrawn from the influence of equitable rules, and is governed by the rules of law; and under these rules the last grantee of the fee is deemed the first purchaser (a). Hence, after a conveyance from the mortgagee in fee to the mortgagor, or his heir; or after a grant by a fine *sur grant et render*, which is, in its effect, a conveyance and re-conveyance; or after a feoffment and re-enfeoffment; or any other conveyance, producing the effect of a grant and re-grant, the course of descent will be changed; since it is in a court of law, and not in a court of equity, that any question of right between the different classes of heirs must be decided (b).

To apply these observations to the case of *Roe v. Baldwere* (c): Had the parties left the legal estate in the demandant in the recovery, the equitable ownership would have been governed by the principles of courts of equity; and the heir to the seisin, as it existed antecedent to the recovery, would have been preferred \*to the general heir of the vouchee in the recovery; with [\*439] the exception only that the heir of the purchasing ancestor, and not the heir under the entail, is the heir for whom inquiry must be made in investigating the title.

But when the demandant had surrendered to the use of the vouchée, the vouchee had acquired the legal estate under a new seisin or title. He was the first purchaser of that estate; and, consistently with principle, the heir on the part of his father, and not the heir on the part of his mother, or other purchaser of the estate-tail, ought to have prevailed. This was the opinion of gentlemen most conversant with subjects of this nature.

From the high character of Lord *Kenyon*, and on the rule *stare decisis*, it is more likely that *Roe v. Baldwere* will be followed in future adjudications, than that it will be over-ruled. But the evident departure from principle, and a fear lest this case should be used as a precedent for other cases, not the same in circumstances, or in terms, seemed to call for these observations; though the general plan of this work is to avoid a detailed discussion of questionable points. At all events, the observations will be useful, as illustrating the difference of the rules, which govern the law of descents in courts of equity, and those which govern descents in courts of law.

\*As to the person last seised :

[\*440]

In all cases of immediate descent from the first purchaser, the first purchaser is considered as the person last seised, whether he had an estate in possession, reversion, or remainder; and whether he had an actual possession or seisin, or not; and whether he had an estate, or merely a contingent or executory interest.

As to persons claiming by mesne descent, a distinction must be made between lands held in possession, and lands held in remainder

(a) Dougl. 771.

(b) *Goodright v. Wells*.

(c) 5 Term Rep. 104.

or reversion, after an estate for years; or after a particular estate of freehold, as for life or in tail.

On the death of each ancestor, his heir becomes the owner, and, *ipso facto*, by the descent, he has a seisin in law.

This seisin does not make him a stock or ancestor, unless he obtain an actual seisin; and if the lands are held for an estate in possession, he cannot obtain an actual seisin, unless he, or some one by his commandment, or subsequent assent, or the guardian in chivalry, in socage, or by nurture on his behalf, or some person to whom he leases the lands, actually enters into them; or he changes the state of the title by making a conveyance or lease, &c. and thus acquires a new reversion (a).

And it remains to be seen what shall be deemed an actual seisin, under the different circumstances of the descent of an [\*441] estate of \*inheritance, subject to a prior term of years, or a prior particular estate of freehold.

And first as to the seisin of the inheritance, subject to a prior term for years.

The possession of the termor is the possession of the owner of the reversion or remainder. It gives an actual seisin as distinguished from a seisin at law (b); as livery to a termor for years vests the seisin in the grantee of the remainder for life, in tail, or in fee.

So the possession of a guardian, either by knight-service, in socage (c), or by nurture (d), or of a copyholder, or of a tenant at will (e) [but *quæ*. as to tenant by sufferance, *ibid.*] will give an actual seisin as distinguished from a seisin at law, and make a *possessio fratris*, in other words, the stock of a new succession.

But if a man has an estate in fee, mediately or immediately expectant on an estate for life or in tail, in himself (f), or a stranger, and the fee descends from him to his heir, and the heir dies intestate, without having acquired an actual seisin of this remainder or reversion in fee; the *heir to the person last seised*, viz. the ancestor of the mesne heir, shall be entitled by descent.

But an actual seisin may be gained of this reversion or remainder by several means.

[\*442] \*It was at one time supposed that an actual seisin might be gained by receiving rent reserved on the estate for life or in tail. The point has been decided different ways. According to Lord Coke (g), there would be an actual seisin by receiving the rent. But according to Lord Hale, in his notes, it has been adjudged, and the law seems to be, that in such case, seisin of rent does not make *possessio fratris*.

1st, An actual seisin may be gained of such reversion or re-

(a) Watkins, 64; 1 Inst. 15 a; Doe v. Keen, 7 Term Rep. 366.

(b) 1 Inst. 15 a. (c) Ibid.

(d) Newman v. Newman, 2 Wilson, 516.

(e) Hale's Notes to 1 Inst. 15 a.

(f) 1 Inst. 281 a; Watk. Descents, 161.

(g) 1 Inst. 15 a.



mainder, by making a lease, and thus acquiring a new reversion, or (for so the law seems, though no authority for the point has been found,) by making a conveyance to uses, so that the fee is taken back by express limitation or resulting use, under his own act or conveyance.

2dly, An actual seisin may be acquired by the determination of the prior particular estates of freehold, and obtaining actual possession, and, as a consequence, seisin, either by the heir himself, or by his tenant or guardian, or any other person on his behalf.

It is to be remembered, that an actual seisin once acquired may be defeated under a prior title; and if such seisin be defeated in the life-time of the heir, then as far as such seisin is defeated, the title must be deduced from the ancestor last seised, and not from the heir whose seisin was thus defeated.

For example; *A* dies seised, and *B* is his heir, and the [\*443] heir obtains an actual seisin; but this seisin is defeated, as to a third part, by the endowment of a woman entitled to dower.

As to this one-third part, the law considers the mesne heir in the same state as if he never had obtained an actual seisin.

On this point it may also be observed, that if the heir had died seised his heir would have been entitled; and a subsequent endowment would not have disturbed his title as heir.

The rule *dos de dote peti non debet*, with its distinctions, flows from the same principle.

So if the immediate heir had made a lease for life, and the lessee had endowed the widow, this endowment would not have defeated the seisin of the heir, because the heir had acquired an actual seisin; and the reversion was changed and altered by the lease for life; and the reversion had become expectant on a new estate for life (*h*); in other words, there was a change in the reversion.

And there are some interests of which an actual seisin cannot be acquired, as contingent remainders. But each heir for the time being is so far the owner that he may devise or re-lease.

It is not sufficient that the party is stated in the deed to be, or to have been, the heir, except in cases in which the possession has been held for a long series of years, on the footing of the title of the heir.

\*In a case of recent descent, the state of the pedigree [\*444] should be authenticated by certificates of marriage, baptism, &c. or by affidavits of persons acquainted with the family.

This is more particularly proper when the heir is a collateral relation, and the descent is from a remote ancestor; and every case must be governed by its own circumstances, and the probability that the person who asserts his ownership as heir, is the person in whom that character is, or was, fulfilled.

It sometimes happens that no heir on the part of the father can

(h) 1 Inst. 15 a.

be found ; and the maternal heir claims an estate of which the person last seised was the purchaser.

Titles of this sort, till protected by a long possession, or by a fine with proclamations, &c. &c. should be viewed with great jealousy ; investigated with great care ; and finally accepted with more than ordinary caution, by requiring indemnities, &c. when they can be obtained ; for though the possession may be held, under a title made out *prima facie* by the maternal heir ; yet, with the exception of particular cases, in which the extinction of the inheritable blood of the father can be traced, as a consequence of alienage, bastardy, or the like, it is highly probable, and almost certain, that there does exist a more immediate heir, although from the obscurity of the family such heir cannot be traced.

[\*445] In many instances also, the investigation is \*not made as extensively as it might and ought to be ; for although there may be an extinction of the inheritable blood on the part of the father or grandfather of the person last seised, or of the first purchaser ; it by no means follows that the heir on the part of his mother is entitled to succeed.

According to the canons of descent, as propounded by *Blackstone*, there must be a failure of the collateral relations on the side of the father, including the maternal ancestors, before an heir on the part of the mother of the person last seised can establish a title in himself. It is to be lamented that this rule is not fixed by a decision. Within a few years a case was agitated, which, if it had not been compromised, would have led to a decision of this point.

In tracing a pedigree of collateral descent from a first purchaser, the course to be pursued under the canons, and their illustration, as propounded by *Blackstone*, is,

1st, To find the father, and then to inquire for his collateral relations :

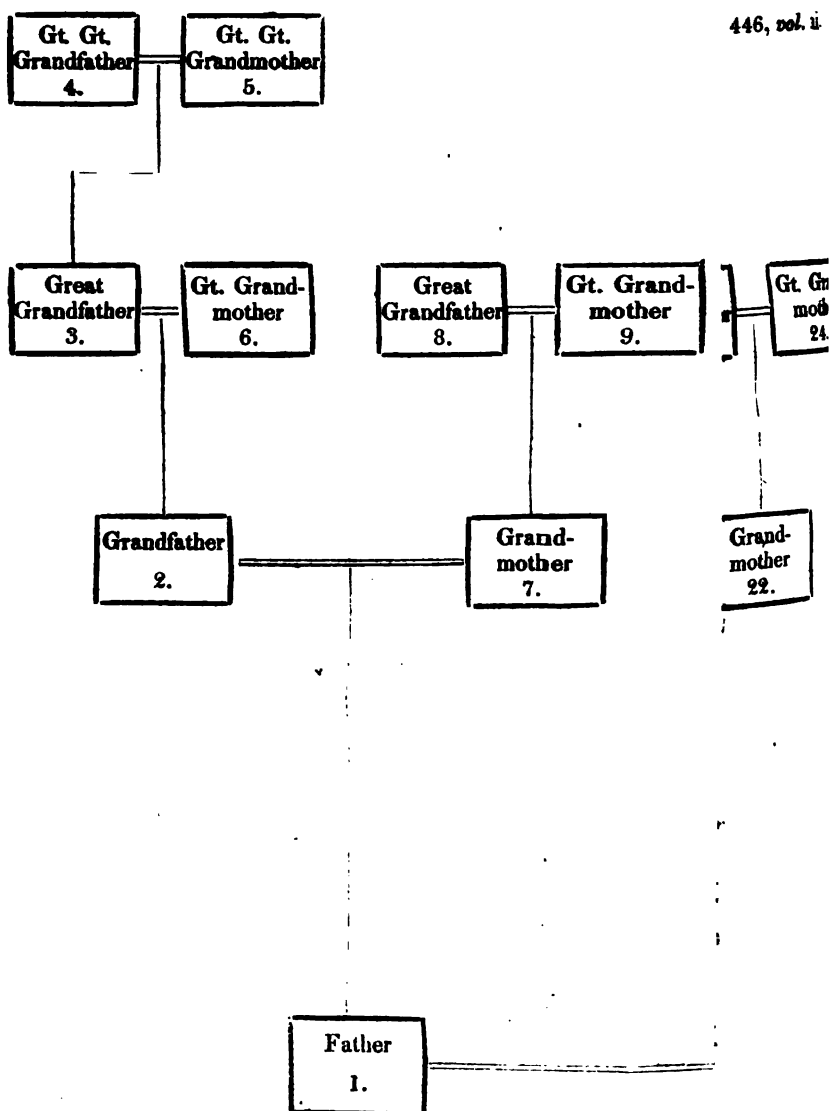
2dly, On their failure, to inquire for a grandfather, and his collateral relations ; and so on proceeding to the person next in degree of proximity.

Having gone to the utmost extent to which the paternal line can be traced, the *third step* is to find the mother of the *most remote* paternal ancestor, and to inquire for her collaterals ; and on their failure, to proceed in an inverse order, coming down at [\*446] last to the collaterals of the \*mother of the father of the person last seised ; and on failure of that line only can the collaterals on the part of the mother of the person last seised be admitted.

The simple table which is annexed will, in the most effectual manner, elucidate these observations ; taking the figures as denoting the order or priority of succession in which the collateral relations of the persons designated by the several figures, will be entitled to take, a *feudum novum* descending *ut antiquum*, after a failure of descendants of the first purchaser.

It is also to be remembered, that no one can succeed as heir un-





less he be of *the blood* of the first purchaser, as well as heir of the whole blood to the person last seised; consequently, in all cases in which any other person than the person last seised, was, in point of law, the first purchaser, the pedigree is narrowed, and circumscribed, by excluding all persons except those who are connected in blood, with the person who was the first purchaser; therefore, when the father was the first purchaser, all persons, as far as they must claim as being of the blood of the mother only, either in the descending or collateral line, will be excluded.

But it may happen that the same person may be related, at the same time; by the blood of the father, and also by the blood of the mother; and may be entitled, as being of the blood of the father, though excluded as being of the blood of the mother.

In successions in the collateral line, half-\*blood never [\*447] can exist in any other branch of the pedigree than that which traces the pedigree of the person last seised from the common ancestor: all descendants from any other person in the line of succession must be of the whole blood to the person last seised; since they are descendants from two persons being the common ancestors. Pedigrees frequently become unnecessarily complicated, from disregarding these distinctions.

And with respect to the rule *possessio fratris facit sororem esse heredem*, it is also to be observed, that the mere circumstance that a person is of the half-blood to the person last seised, will not exclude him from taking as heir, if he be of the whole blood to those ancestors through whom the descent is to be derived by representation.

Thus, suppose two first cousins to intermarry, and to have issue *F*. The father *D* also had issue *G* by another wife, and *F*, being the first purchaser, dies seised: *G* could never take as the paternal heir of *F*, because he is of the half-blood to *F*; but he can take as *maternal heir* to *F*, because, with reference to *E*, the maternal ancestor, *D*, and consequently *F* his son, derives his pedigree from two persons who were the common ancestors of *E*.

Thus, in tracing the pedigree from *E*, *G* is considered as of the whole blood of *E*, and therefore of *F*, although with reference to a descent from *F*, as first purchaser, or in the \*paternal line, in right of representation of the father as [\*448] father, distinguished from being cousin of *E*, he is not of the whole blood to *F*.

Instead, therefore, of propounding the rule to be, that the heir must be of the whole blood of the person last seised, it would be more correct to say, that he must be of the whole blood to, that is, descended from, those two parents, whether father and mother, or grandfather and grandmother, or other ancestors in a higher degree, who are the common link or *vinculum* in the pedigree. The apparent difficulty of the case which has been stated, arises from the circumstance that *G* claims and takes as *cousin*, and not as brother, to *F*. One of those discussions, which take place be-

tween young gentlemen studying the law, and shortly afterwards a case of actual practice, led to this criticism. In short, general rules frequently mislead students from the universality of their terms; and it is only by a critical examination of the reason of the rule, that the exception can be discovered.

The proposition that a father cannot be heir to his child, is another instance which leads to a similar discussion. The father may be heir to his child, as his *cousin*, though he never could be his heir, as his *parent*.

To examine this point: In the second volume of his Commentaries (p. 13), the learned *Blackstone* has a passage [\*449] in these words: "In \*personal estates the father may "succeed to his children; in landed property he can never "be their heir, *by any the remotest possibility*." By this passage it must be understood, that the *father* cannot succeed to his son, merely in the character and relation of father. In any other sense, it is not by any means accurate to say the father cannot, "by any the remotest possibility," succeed to the son as his *immediate heir*. The intention of *Blackstone* evidently was to admit, that which, certainly, is true, that the father, though he cannot be heir to the son, merely as his father, yet, eventually, may become heir to the estate; and after a descent to any collateral kinsman, may succeed as the heir to that person. It also seems to have been his intention to have denied that there was any possible means by which the father could succeed as *immediate heir* to his son, by any the remotest possibility. A contrary doctrine, however, is clearly established. It has been held, that the father may be *immediate heir* not only to the estate of his son, but to his son, as the second cousin of the son. For as the father would be entitled to be heir, as *cousin* to the son, if he did not sustain the relation of father, he is not excluded merely on the ground that he is the father. In searching for the heir of the son, the father, considered merely as the father, must be passed over as not inheritable; on the other hand, he is to be allowed the right of a cousin and collateral kinsman, [\*450] when he can claim in that character, for *\*quum duo jura in uno persona concurrunt, æquum est ac si essent in diversis*. Thus he is to be considered in a double point of view; first, as a father, secondly, as a cousin. Suppose then two cousins to intermarry, and that there is issue of that marriage a son, who purchases lands and dies: In inquiring for the heir to the son, it is a decisive objection against a claim of the father, that he is the father; as often as the question is, whether he shall be preferred to the uncle or great uncle of the son, on the part of the father. But let the paternal line fail, and then recourse must be had to the maternal line. In that line the father may succeed as a *cousin* to his son, thus:

*A*, a bastard, has two sons, *B* and *C*; *B* has a son *D*; *C* has a daughter *E*; these two children intermarry and have issue *F*, who

purchases lands, and dies without issue. In this case *D*, the father, *B* the grandfather, and *A* the great grandfather, as the paternal ancestors of *F* in the direct ascending line, are to be excluded from the succession. *C* therefore, if living, as the paternal great uncle, or *E* his daughter, as the paternal cousin in right of her representation of *C*, and notwithstanding she is the mother of *F*, may succeed to his estate. But suppose *C* and *E* to be dead without issue, then *B*, as the brother of *C*; and if *B* be dead, then *D* his son may succeed; the former as brother, the latter as nephew to *C*; in other words, as the *cousin and maternal heir of F*

*\*the son.* In this case, *F* is supposed to have been the [\*451] purchaser; and the observations show that both his father and mother, as his cousins, are in the line of succession to him, and capable of being his heirs in the collateral line of their relationship. From the circumstance, that the son is the purchaser, arises the conclusion, that the mother stands preferable in the line of succession to the father. The same would be the case if the lands had been purchased by *D* the father, *B* the grandfather, or *A* the great grandfather of *F* in the paternal line. On the other hand, suppose *E* the mother, or *C* her father, as the maternal grandfather of *F*, to have been the purchaser, then *B* the paternal grandfather, and in right of him, *D* the father of *F*, would be preferred to *C* and *E*.

The situation of these persons may be represented by a circle, in this form:





\*To find the paternal heir of *F* the purchaser, the circle [\*453] must be searched from the left to the right, beginning with *D* the father, and ending with *E* the mother, as cousin to her son. By supposing *C* and *E* to be dead without issue, there will be a failure of the heirs of *F* on the part of his father, though his father, or his paternal grandfather be living. Recourse must, therefore, be had to the *maternal* line. To find the heir in this line, the reverse of the circle must be taken, and then *B*, if living, is the first inheritable person as the brother of *C*; and if *B* be dead, then *D* the father of *F*, as his second cousin, will, in right of his representation of *B*, be the immediate heir of *F*.

The difficulty, if any, in understanding these positions, will be removed by considering that the father will succeed to the son as *his cousin and heir in the maternal line*, and not as his father. The like observation applies to the mother when she is *inheritable*, for she takes as heir in the *paternal* line.

Experience also suggests the caution, that in case of recent descent care should be taken that the descent has not been interrupted by any testamentary disposition.

Hence the practice of requiring evidence to raise the presumption, that the last owner, and when there have been intermediate descents, each means heir has died intestate as to the lands in question.

In deducing a title under trustees, this caution \*is not [\*454] observed so frequently, as the importance of the case deserves.

To satisfy a purchaser of intestacy, the will of each successive owner or trustee, if there be any will, should be produced; that the effect of such will on the title may be considered; and as often as it is alleged that each intermediate owner, or trustee, died intestate, then letters of administration should be produced; or if, as it sometimes happens, it is alleged that the party had not any property, and therefore no administration has been taken, there should be a search for a will in the ecclesiastical courts of the several ordinaries, to whom the right of granting the administration of the assets, if any, would have belonged; namely, the prerogative court, the court of the diocesan, and of the archdeacon, or other person having local or peculiar jurisdiction. To take letters of administration for this direct purpose, is of no use, except to induce the belief of intestacy from the oath which is taken; and an affidavit would equally answer that purpose.

On occasions, however, of pedigree, as in all other instances, a discretion must be exercised. It should be governed by circumstances; and the caution will vary with the character of the persons with whom the purchaser is dealing. In proportion as they are illiterate, ignorant, or dishonest, in the same proportion the industry of the purchaser should be exerted, to ascertain the real state of the title.

\*Much also depends on the character and reputation of [\*455]

the solicitors, who are concerned for the family; and the probability there may be of any fraud having been practised; or of any misrepresentation having been made; or of any information being withheld.

Sometimes this inquiry is extended even to a period of a century.

This, however, is carrying the caution beyond the bounds of prudence. With the exception of those cases in which there is a reference to a will, and the nature of the case, and the circumstances of the title may render it expedient to ascertain whether an estate-tail, with special limitations in strict settlement, might not have been created by such will; or there is, from a common recovery appearing on the abstract, some ground to suspect an entail; and there is a chance of tracing such entail by a search for the will of a given person.

Such searches for wills of persons who were the owners at distant periods is more particularly necessary, when the possession has been held by the same person, or by the same family, for a long series of years; as sixty years or upwards.

In one instance the lands had been held for eighty years by the same person; and after great reluctance, the will of her brother was produced; and though it had been alleged that he had died intestate, it turned out that the present owner was tenant in tail under his will.

[\*456] \*These and the like instances suggest cautions which often subject the conveyancer to the imputation of giving unnecessary trouble, and of being the author of delay and expense!!

And in this place it may be observed, that those titles are most eligible in which there has been a frequent change of property from one family to another, and in which the chain of evidence is carried on by a connected series of purchase deeds, settlements, or wills, &c.

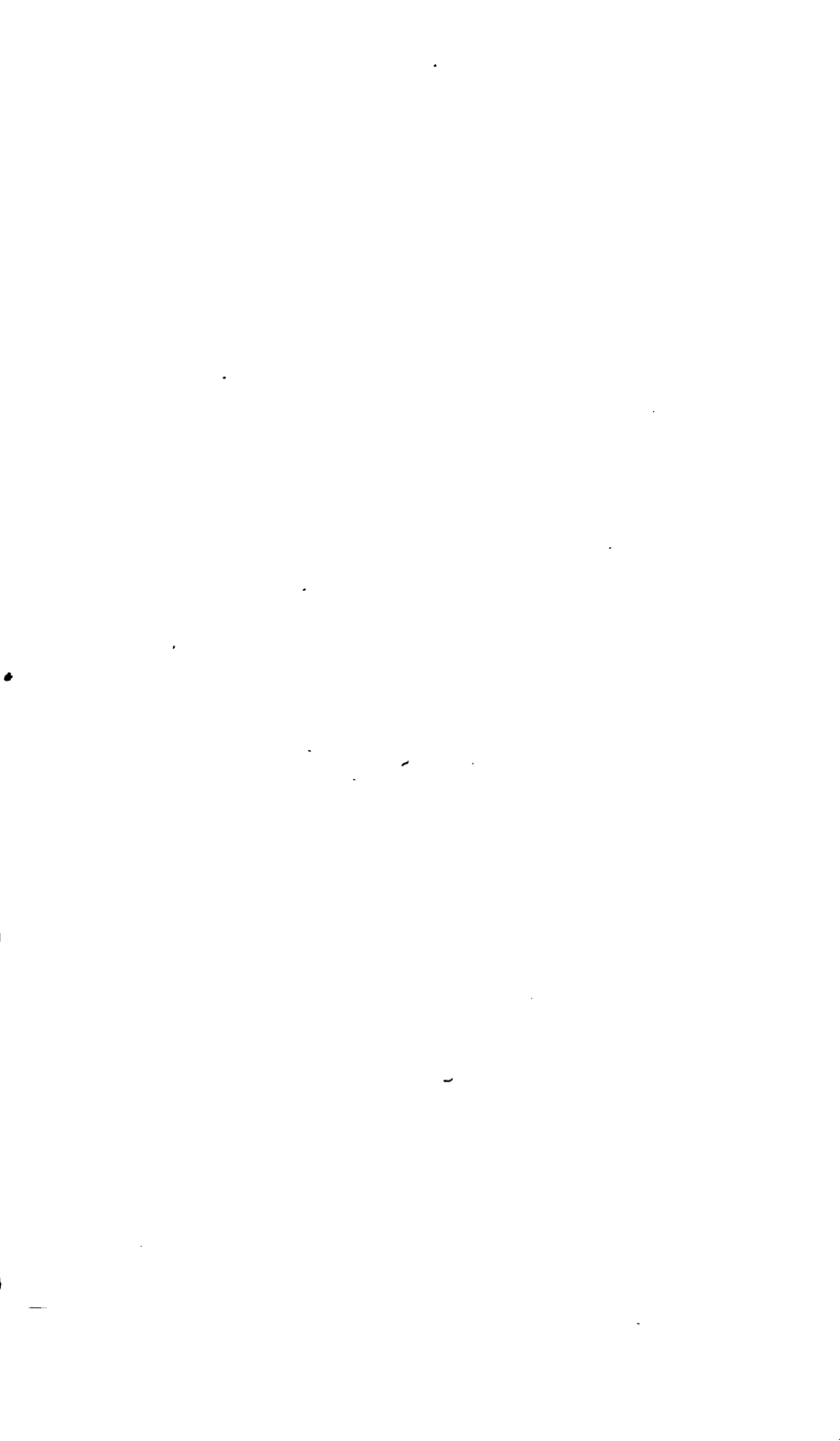
As an exception to the general rule, that the property must be derived from the first purchaser, it is to be noticed, that when easements, or rights of way, or rights of common, are made appendant to land, the accessory will follow the principal; and the heir to the land, though he be a maternal heir, will be entitled to the easement, &c. though purchased by a person who has left a paternal heir.

Lands which escheat descend with, and as parcel of, the manor, in right of which the escheat takes place.









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